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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUDY BOEKEN, as Trustee, etc., Plaintiff and Respondent, v. PHILIP MORRIS INCORPORATED, Defendant and Appellant.	B152959 (Los Angeles County Super. Ct. No. BC226593)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed as Modified conditioned upon acceptance of Remittitur.

Arnold & Porter, Murray R. Garnick, Robert A. McCarter, Ronald C. Redcay and Maurice A. Leiter for Defendant and Appellant.

Michael J. Piuze for Plaintiff and Respondent.

BACKGROUND

Richard Boeken commenced this action on March 16, 2000, by filing a ten-count complaint for personal injuries caused by his cigarette addiction.[1] The complaint alleges that Boeken began smoking in 1957, when he was a minor, that he smoked Marlboro and Marlboro Lights, both manufactured by Philip Morris USA, Inc., and that he was diagnosed with lung cancer in 1999.

The cause was tried to a jury under theories of negligence, strict product liability, and fraud, over approximately nine weeks, beginning in March 2001. The jury found that prior to 1969, Philip Morris's product was defective either in design or by failure to warn, and that it caused Boeken's injuries. The jury also found that Boeken was injured as a result of Philip Morris's fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation; and that he justifiably relied on Philip Morris's fraudulent utterances and concealment. The jury awarded $5,539,127 in compensatory damages, and assessed punitive damages in the sum of $3 billion dollars.

Philip Morris's motion for judgment notwithstanding the verdict was denied. On August 9, 2001, Philip Morris's motion for new trial was granted solely upon the issue of punitive damages, and conditionally denied, subject to Boeken's acceptance of a reduction in punitive damages to the sum of $100 million. Boeken consented to the reduction, and an amended judgment was entered on September 5, 2001. Philip Morris and Boeken then filed timely notices of appeal.

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[1] Since Philip Morris and Boeken have both appealed, we shall refer to them by name. Richard Boeken has died, but we shall continue to refer to respondent and cross-appellant as Boeken, since his successor in interest is his widow of the same name, Judy Boeken, trustee for the Richard and Judy Boeken Revocable Trust.

Philip Morris assigns seven categories of error upon which it contends that it is entitled to a reversal. First, Philip Morris contends that Boeken's fraud causes of action remained unproven, because there was insufficient evidence that Boeken heard or relied on any particular false statement or that any reliance was justifiable, and because Philip Morris had no duty to disclose any information found to have been fraudulently concealed.

Second, Philip Morris contends that Boeken failed to prove the elements of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.

Third, Philip Morris contends that the trial court erred in refusing to allow it to impeach Boeken with evidence of his 1992 felony conviction.

Fourth, Philip Morris contends that some of Boeken's claims were preempted by federal law regulating cigarette advertising, that the trial court should have excluded evidence and argument related to youth-targeted advertising, and that the trial court should have instructed the jury not to consider such evidence.

Fifth, Philip Morris contends that the trial court abused its discretion by removing a juror during deliberations.

Sixth, Philip Morris contends that Civil Code section 1714.45 bars all or part of Boeken's claims.

Philip Morris's final contention is that the punitive damage award was excessive pursuant to federal and state constitutional law. Boeken's appeal requests that we reinstate the jury's punitive damage award.

Except for the final contention, we reject all of Philip Morris's claims. We agree that the award for punitive damages, even after reduction by the trial court, is

excessive and we affirm the grant of a new trial unless Boeken accepts a further remittitur to the amount of $50 million.

We shall discuss each contention, but not strictly in the same order it is asserted in the briefs, since some issues are interrelated and thus more easily discussed together.

DISCUSSION

1. *Philip Morris Has Forfeited its Claim that Substantial Evidence Does Not Support the Fraud Verdicts*

Philip Morris contends that there was insufficient evidence of Boeken's reliance on any false statements or nondisclosures to support a finding of fraud. In particular, relying upon *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082 (*Mirkin*), Philip Morris contends that the evidence was insufficient to prove that Boeken was aware of *specific* misrepresentations and acted upon those specific misrepresentations.[2] Philip Morris also contends that the evidence was insufficient to establish a duty to disclose the concealed information.

The jury found against Philip Morris on the fraud claims of intentional misrepresentation, concealment, false promise, and negligent misrepresentation. Philip Morris challenges only the evidence of its duty to disclose and of Boeken's reliance, not the evidence establishing that it made misrepresentations, made misleading statements and concealed the facts that would have clarified them, or

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[2] In *Mirkin*, the Supreme Court reaffirmed the California rule that a fraud cause of action requires proof of actual reliance, and rejected a fraud-on-the-market theory of reliance advocated by plaintiffs who could not plead or prove that they heard or read any of the alleged misrepresentations, whether directly or indirectly. (*Mirkin*, *supra*, 5 Cal.4th at pp. 1088-1092.)

that it made a false promise, all with an intent to defraud. Indeed, Philip Morris does not challenge or even summarize most of the large volume of evidence showing that it was aware of the health hazards and addictive nature of its tobacco products, or that it undertook a campaign to disseminate falsehoods about smoking and health, and to conceal the truth from the public, including Marlboro smokers such as Boeken, in order to mislead them into believing that their cigarettes were safe and not addictive.

"'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The judgment is presumed to be correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) And we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) It is the appellant's burden to demonstrate that it does not. (*Ibid*.)

In furtherance of its burden, the appellant has the duty to fairly summarize the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) This means that the trial evidence must be summarized in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolving any conflicts in support of the verdict. (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.)

Further, the burden to provide a fair summary of the evidence "grows with the complexity of the record. [Citation.]" (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record in this case is very complex.

The testimony heard by the jury spans 25 of the 40 volumes of reporter's transcripts. There are also 75 volumes of clerk's transcripts in the record. Boeken has provided copies of approximately 40 exhibits admitted at trial, but it appears that there were hundreds more shown to the jury that have not been transmitted to this court.

In addition, portions of Boeken's videotaped deposition were played for the jury, and the parties have lodged a redacted transcript of the deposition, containing what appears to be 300 pages. Videotaped interviews of two other witnesses were lodged at our request, and were not transcribed.

Nevertheless, Philip Morris has provided only the briefest summary of the trial evidence, and has summarized only those facts which support its theories. Almost all of Philip Morris's factual summary consists of evidence favorable to its position -- evidence showing that the dangers of smoking were well known by the public in the 1950s and 1960s; and other evidence from which a jury could reasonably infer that Boeken understood the health risks of smoking.

Even if Philip Morris were to show that the inferences it wishes us to draw are reasonable, we would have no power to reject the contrary inferences drawn by the jury, if they are reasonable as well. (*Crawford v. Southern Pacific Co*., *supra*, 3 Cal.2d at p. 429.) And a recitation solely of Philip Morris's own evidence is not a fair summary for purposes of determining whether any inferences drawn by the jury are reasonable and supported by substantial evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

Philip Morris's failure to provide a fair and complete summary of the evidence supporting the judgment results in forfeiture of contentions based upon the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) We must assume that the missing evidence, including the

evidence supplied by missing exhibits, was sufficient to support the jury's findings. (*Supreme Grand Lodge etc. v. Smith* (1936) 7 Cal.2d 510, 513.)

In lieu of tendering the proper summary, Philip Morris suggests that Boeken's counsel, Mr. Piuze, conceded the absence of evidence of reliance and causation during argument on post-trial motions when he answered, "No," to the following question by the court: "The question is, can the plaintiff point to a single statement made by Philip Morris that ultimately reached Mr. Boeken that can be traced backward through a definite causal link back to Philip Morris?" But the discussion of the matter did not end with that negative response. Piuze went on to explain to the court that the issue of reliance had been proven by *circumstantial* evidence.

"The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814.) Reliance "'may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of [reliance] than . . . direct testimony to the same effect.' [Citations.]" (*Id*. at p. 814.)

We conclude that there was no concession, and in order to preserve the issue for appeal, Philip Morris was required to provide a fair summary of the evidence supporting the verdict, whether direct or circumstantial, and it did not do so. In any event, our review has revealed sufficient evidence to support the judgment, as we discuss in the next section.

2. *Substantial Evidence Supports Actual Reliance and Duty Findings*

Philip Morris contends that the evidence was insufficient to establish a duty to disclose information that it fraudulently concealed. At the same time, however, Philip Morris concedes that a duty to speak may arise when necessary to clarify

misleading "half-truths." (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1082-1083.) But, Philip Morris contends, no duty arises were the plaintiff has not been misled by the half-truths.

Philip Morris confuses the elements of duty and reliance. The duty arises upon the utterances of the half-truths; whether the plaintiff was misled is a question of reliance. (Cf., *Randi W. v. Muroc Joint Unified School Dist., supra*, at p. 1084.) Since Philip Morris does not challenge the evidence of its half-truths, we turn to its contentions with regard to reliance.

Relying on *Mirkin*, *supra*, 5 Cal.4th 1082, Philip Morris suggests that in order to show reliance, Boeken was required to prove that the false or misleading representations were made directly to him and that such proof must include the exact words of the false or misleading representation upon which he relied. We find no such requirements in *Mirkin*.

As stated in *Mirkin*, Restatement Second of Torts section 533 provides: "'The maker of a fraudulent misrepresentation is subject to liability . . . to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved.'" (*Mirkin*, *supra*, 5 Cal.4th at p. 1095.)

The record supports the conclusion of the jury that Boeken was a target of Philip Morris's misrepresentations and that he actually relied upon them. But a meaningful review of the evidence is impossible without a summary of the misrepresentations, misleading half-truths, concealments and false promises presented to the jury. For a better understanding of the issues, we shall start at the beginning of Boeken's case, although some of the facts recited may not be directly relevant to the issue of reliance.

Physicians had the ability in the mid-nineteenth century to diagnose lung cancer. It was a rare disease until some years after the first commercial pre-rolled cigarettes were introduced in the United States in 1913. In the 1930's, there was a sharp increase in the number of cases diagnosed, and by the end of World War II, its incidence had increased 20-fold.

Boeken's epidemiological expert, Dr. Richard Doll, joined Professor Bradford Hill at the London School of Hygiene in the late 1940's, to conduct the first studies in the United Kingdom to determine the cause of lung cancer, and why its incidence had increased so dramatically. Statistics established the causal connection between smoking and cancer, and Doll and Hill published their results in 1950 in the British Medical Journal.[3]

A Dutch scientist had published a paper in 1948, having reached the same results, and in 1950, a smaller American study was published in the Journal of the American Medical Association by American scientists, Drs. Graham and Wynder, also reaching the same conclusion. There had been earlier studies in Germany, but they were not given much weight because the scientific methods used were not optimal. Around 1953, Wynder applied tobacco tars to the skin of mice for several months, and produced skin cancer.

The popular media and the UK Department of Health were not convinced by the Hill and Doll study, and so the two undertook a years-long study of 40,000 smoking and non-smoking English doctors who did not have lung cancer. They thought it would take 5 years, but in 1954, after two years and 35 deaths due to lung cancer, they felt the result was clear and published it immediately in the

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[3] Doll has been awarded many honors over the years for his work on tobacco, including knighthood in 1971.

British Medical Journal. It was more widely accepted and changed attitudes considerably.

The American Cancer Society then undertook a two-year study with 190,000 subjects, in order disprove Doll's conclusions; and in 1954, its scientists concluded that the British study had been correct. Even after the publication of Doll's second study and the American Cancer Society study, some leading scientists still questioned the link between lung cancer and smoking, and opinion among scientists was evenly divided until about 1956. At that time, opinion had firmed up quite definitely among scientists that smoking caused lung cancer.

Neil Benowitz, M.D., Boeken's addiction expert, testified that nicotine is addictive, and the most effective way addiction is achieved is delivery by cigarette smoke.[4] Withdrawal symptoms include irritability, anxiety, insomnia, trouble concentrating, nervousness, and dysphoria (mild depression), and can last for months after quitting. Some symptoms last forever. Smokers use denial and rationalization to continue doing what is obviously or apparently harming them and may acknowledge a general risk, but given a choice of conflicting opinions, they will choose the opinion that supports continued tobacco use.

In 1954, the tobacco industry embarked upon a decades-long strategy to create public doubt about the "health charge" through "vigorous" but not actual

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[4] More specifically, Benowitz testified that nicotine is similar to a hormone called acetylcholine (ACH), which is responsible for nerve communication, and is highly concentrated in the brain. ACH binds to receptors which release other hormones that affect mood and behavior. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Nicotine becomes necessary for the brain to function normally. Smoking creates an aerosol, and when the gas goes directly to the lungs, it delivers the nicotine instantly to the heart and brain, achieving its effect within 15 seconds. This immediate reinforcement encourages addiction. Thus, the smoking (of any addictive substance) is the delivery system that causes the fastest addiction.

denial, such as by claiming that experimental proof was still lacking, and that the statistics were not to be trusted, because they were poorly obtained or grossly exaggerated.[5]

First, several tobacco companies, including Philip Morris, formed the Tobacco Industry Research Committee (T.I.R.C.), a public relations organization, to counter the "anti-cigarette crusade" by providing "balancing information" regarding "unproven facts."[6] To announce its formation, it published "A Frank Statement" in newspapers across the country. The "Frank Statement" claimed, "Distinguished authorities point out . . . that there is no proof that cigarette smoking is one of the causes [of lung cancer] [and] statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists."[7]

According to Dr. Doll, the Frank Statement was a "bald untruth" and a lie. While some scientists had questioned the link, most knew at the time of the Frank Statement that smoking caused lung cancer.

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[5] Philip Morris's knowledge and actions were shown by the testimony of several former employees of the research and development department, which operated several laboratories, and by a series of internal memoranda between company officers assigned to the labs in the 1950s through the 1980's, including Helmut Wakeham, William L. Dunn, T.S. Osdene, and Robert B. Seligman.

[6] At some time in the late 1950s or early 1960s, the Council for Tobacco Research (CTR) replaced the T.I.R.C.

[7] The Frank Statement also assured the public that the industry was concerned about the possible health effects of tobacco and was researching the question, and promised that it would inform the public immediately if they found it to be harmful. The promise was false. Philip Morris's own expert, Dr. Carchmann, testified the tobacco industry did not publicly admit that smoking was harmful until approximately 2000.

Tobacco studies continued throughout the 1950s in many countries, including Japan, Denmark, and France. In 1957, the United States Heart and Lung Institute, the National Cancer Institute, National Institute of Health, and American Cancer Society appointed a joint committee to advise on the state of the science, and concluded that smoking was a cause of lung cancer. The Auerbach study, published in 1957, showed pictures of various stages to demonstrate how the risk of lung cancer increased after a certain number of years of smoking.

In 1960, the World Health Organization issued a report stating that smoking was a cause of lung cancer, and an editorial in the New England Journal of Medicine stated that no responsible observer could deny the association. Scientists did not yet know what specific substance in cigarette smoke caused lung cancer, but it was proven by 1953 that cigarette smoking caused it by some means, and by 1960, it was indisputable.

Nevertheless, Philip Morris and other tobacco companies continued their campaign of doubt. T.I.R.C. continued its work, issuing press releases, making personal contacts with journalists, providing "favorable" materials for editorials, articles, and columns, and providing assistance to the authors of such books as *You Don't Have to Give up Smoking* and *Smoke Without Fear*.

A 1957 T.I.R.C. press release quoted its chairman and scientific director as saying, "No substance has been found in tobacco smoke known to cause cancer in human beings nor is any specific mouse carcinogen found." The statement was literally true in that the specific mechanism in cigarettes that caused lung cancer was still unknown, but it was misleading, because the cause and effect had been proven.

In the late 1950s, Philip Morris and other tobacco companies formed another trade organization, the Tobacco Institute, to speak on their behalf. The Tobacco Institute issued press releases, such as the 1961 "Tobacco Institute Statement," which asserted, among other things, "The repetition by Dr. Wynder of his firm opinions does not alter the fact that the cause or causes of lung cancer continue to be unknown and are the subject of continuing extensive scientific research by many agencies." And a 1962 press release sent to CBS protesting a program on youth smoking, stated, "causes of lung cancer are still unknown."

The statements were false. In 1961, there were a few other established causes of lung cancer, such as asbestos, but the affected industries were taking precautions to protect people from exposure. Ninety percent of lung cancers were shown to be caused by tobacco, and just ten percent by other causes. By 1961, it was known that most lung cancers were the result of tobacco, and there was no cancer researcher at that time who would say that the cause of lung cancer continued to be unknown.

In 1965, the Tobacco Institute issued a press release based upon the "Genetic Theory" of well-known statistician Ronald Fisher, who opined that there was a genetic factor that caused people to want to smoke and that made them susceptible to lung cancer. That theory had been repudiated in studies in the 1950s in Sweden, the United States, and Finland. The press release also referred to the "smoking theory" of lung cancer, even though no serious scientific researcher considered it a legitimate scientific concept in 1965. The United States Surgeon General had already reported the link in 1964.

In the 1950s, the major cigarette companies, including Philip Morris, entered into a "gentlemen's agreement" not to market products as tested for safety, not to use test results to compete, such as by claiming that one company's cigarette has

produced less cancer in rats, and not to do animal testing with regard to cancer. The agreement was in place throughout the 1960s.[8]

In the 1960s, Congress conducted hearings prior to enacting the Public Health Cigarette Smoking Act of 1969. (E.g., 15 U.S.C. §§ 1331, et seq.)[9] In March 1965, the Tobacco Institute issued a press release in which it described, among other things, the testimony of R.J. Reynolds president Bowman Gray before Congress on behalf of cigarette manufacturers, including Philip Morris, in opposition to the proposed legislation. Gray told Congress that many scientists held the opinion that it had not been established that smoking caused lung cancer or any other disease; that there was a very high degree of uncertainty; and that a great deal more research was necessary before definitive answers could be given.

By the 1950s, tar was and still is thought to contain most of the organic materials that are likely to cause cancer. When cigarettes were unfiltered and contained large particulate matter, they were irritating, which kept smokers from inhaling deeply. The growing use of filtered cigarettes in the 1960s reduced the amount of delivered tar from about 35 to 25 milligrams, and was thought to reduce the risk somewhat, but filters and flavorings, which act as bronchodilators, made

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[8] In prior testimony read to the jury, Dr. Jan Uydess established that Philip Morris set up a laboratory in Germany to conduct health-related studies, such as on emphysema and toxicity, and effects on animal systems. Philip Morris did not do the research in the United States, because issues relating smoking to health and addictiveness were considered to be very sensitive. The reports from the German lab were sent to senior Philip Morris scientist T.S. Osdene at his home, and he would destroy them after reading them.

[9] We shall hereinafter refer to this statute either as the Public Health Cigarette Smoking Act of 1969 or simply as the 1969 Act. The 1969 Act required a health warning on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc*. (1992) 505 U.S. 504, 515-518, 525 (*Cipollone*), discussed within.)

cigarettes easier to smoke. The benefits came in the 1950s and 1960s, which saw a reduction from the 35 milligrams in the 1930's, to 25 milligrams. But there has been no benefit from a further lowering of tar beginning in the 1980's to 10 or 15 milligrams. And further reduction of tar in the so-called low-tar or "light" cigarettes has not resulted in a safer cigarette. It has affected only the *location* of lung cancers and the type of cancer that may be contracted.

It has been generally known since the late 1800's that it is difficult to quit smoking. Scientists have known that nicotine is addictive since the 1920s, although the how and the why came later. At the time of the first Surgeon General's report in 1964, however, many thought that in order to be truly *addictive*, a substance had to be intoxicating, to have a severe withdrawal syndrome, and to be associated with antisocial behavior, such as criminality. The 1964 Surgeon General's report defined drug addiction as "a state of periodic or chronic intoxication produced by the repeated consumption of a drug." Since tobacco was extremely difficult to quit, but was not intoxicating and did not involve anti-social behavior, the Surgeon General used the term "habituation."

In 1965, the World Health Organization discarded the term "habituation" in favor of "dependence," which encompassed addiction, and the terms *addiction* and *dependence* were generally used interchangeably after that to mean any compulsive drug use. *Dependence* was defined as giving the use of a substance a higher priority than other things important to the user, like money or health. The intoxication element became obsolete, and *habituation* fell into disuse. By 1988, the Surgeon General's report dropped *addiction*, whether to intoxicating drugs or nicotine, in favor of *dependence*. But the tobacco companies continued urging

obsolete terminology through misleading statements to the public, according to Benowitz.

Internal memoranda demonstrate that as early as 1959, Philip Morris recognized that "[o]ne of the main reasons people smoke is to experience the physiological effects of nicotine on the human system"; and that Philip Morris researchers knew no later than 1959 that addiction was a probable reason why people smoked. A 1969 memorandum shows that Philip Morris's scientists recognized that nicotine was a drug, but feared regulation by the Food and Drug Administration should this knowledge become public.[10]

Dr. William Farone, who testified for Boeken, was hired in the mid-1970s by Philip Morris for his expertise in colloid chemistry, which relates to aerosols, such as smoke. It was already commonly understood among the Philip Morris scientists at the time he arrived at its laboratory in 1976, that nicotine was addictive. On several occasions, Dr. Osdene described his mission as one to "maintain the controversy," which Farone understood to mean creating doubt whether nicotine was addictive and whether smoking caused disease.

An internal memorandum shows that by 1972, Philip Morris recognized that the more nicotine a cigarette delivered, the greater its market. By then, the Marlboro brand was outselling the popular brands of earlier years.[11] A competitor,

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[10] Philip Morris attorneys were concerned that research amounting to tacit acknowledgement that nicotine was a drug would be "untimely" because of a legislative effort to transfer authority over tobacco to the FDA. In a 1980 internal memorandum, Robert B. Seligman, Osdene's successor as vice president of research and technology, suggested that Philip Morris continue to study the "drug nicotine" to stay abreast of developments with an active research program, but cautioned, "we must not be visible about it," since the attorneys would "likely continue to insist upon a clandestine effort."

[11] Marlboro is still the best selling brand in this country.

R.J. Reynolds, conducted a study to determine why, and found that the PH of Marlboro smoke was much higher that the smoke from any of its brands. The higher the PH in cigarette smoke, the more free-base nicotine is delivered to the smoker. Ammonia raises the PH level, and occurs naturally in tobacco, but Philip Morris added urea to Marlboro tobacco, which increases the release of ammonia into the smoke.

In 1977, when Philip Morris scientist Carolyn Levy began to study the effects of nicotine withdrawal, her supervisor, W.L. Dunn, suggested to Osdene that he should "bury" any results, should they show similarities to morphine and caffeine. According to Farone, in 1984 Philip Morris shut down some research programs in order to eliminate research that could show that cigarettes were addictive or that could prove that they cause cancer; senior management no longer wanted to do research that could be used against Philip Morris.

Paul Mele, Boeken's expert in behavior pharmacology with additional training in the area of drug abuse, testified that he was employed by Philip Morris from 1981-1984. Philip Morris employed him to work in its secret laboratory where rat studies were conducted in an attempt to identify a nicotine substitute that would eliminate the adverse cardiovascular effects, but still keep people smoking.

A nicotine substitute would have to bind in the same area of the brain and produce the same effects on brain tissue, but Mele and his coworkers were told never to use the words, "drug" or "addiction."[12] Thus, they euphemistically concluded that rats "will work for" nicotine in the same way that they will work for cocaine or heroin. But the question of addiction or dependence was never in

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[12] The term *cancer* was not to be used either; they referred to it as "biological activity."

doubt, and their research goal was not to prove or disprove addiction, but to find compounds that would substitute for nicotine, in case nicotine were ever banned.

Dr. Mele wanted to publish a paper on nicotine tolerance during the time he worked for Philip Morris from 1981 to 1984, but his superiors would not permit it. He was told the research demonstrated that nicotine was a "dependence producing substance" within the definition of the Diagnostic and Statistical manual of the American Psychiatric Association, and that it would not be acceptable to the company to have this known by the public. During this period, he heard a Philip Morris officer, Jim Remmington, say, "We all know it is addicting, it's addicting as hell. And our real concern is stopping these anti-smoking people outside the gates."

Thus, Philip Morris knew in the late 1950s, when Richard Boeken started smoking, that cigarettes caused lung cancer. Further, it is reasonable to infer that it also knew by that time, or at least well before 1969, that nicotine was addictive, and that the more nicotine its cigarettes could deliver, the more quickly a smoker would become addicted. By creating a false public controversy, Philip Morris's fraud was directed toward all addicted smokers, providing the doubt or parallel "truth" necessary to rationalize continued smoking.

The evidence also shows that Boeken was addicted to smoking, and Philip Morris's campaign of doubt had its desired effect. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. By the time he was 14 years old in 1957, Boeken was smoking two packs a day, and even more as he got older.

By the time he was 15 or 16, Boeken had begun to suffer his first bouts of bronchitis. The doctor gave him antibiotics, but did not tell him to quit smoking. Although his high-school swim coach told him not to smoke, because it would affect his "wind," meaning endurance, no other teacher told him not to smoke. Most of the teachers smoked, as well. Boeken's mother allowed him to smoke

openly at home. She smoked two packs a day herself, and never told him of the dangers of smoking.

Boeken suffered more bouts of bronchitis in his twenties, and by his thirties, he suffered two or three each winter. They were always treated with antibiotics, and no doctor ever told Boeken that they were caused by smoking. Many doctors also smoked at that time. Boeken began to suspect in the mid-seventies that smoking bore some relationship to his bronchitis, but he was unable to stop or even cut down on the number of cigarettes he smoked while he was ill, even when it hurt to inhale.

The Surgeon General warnings went on cigarette packs in the mid-to-late 1960s. Boeken thought that the warnings were "political more than anything else," and that they were required by the government pursuant to some personal vendetta of the Surgeon General. He did not even read the Surgeon General's warning until after he filed this action. Boeken explained, "I believed the cigarette advertisements. . . . I didn't think there was anything wrong. . . . I believed they were good for you. I believed everybody smoked them. You're back in the 60's, right? . . . I didn't believe they were unhealthy."

But Boeken was aware of what he described as a "controversy." He testified that in the 1960s, he heard that the cigarette companies had refuted the fact that cigarettes were addictive, dangerous, harmful, or cancer-causing, and he was aware of a "conflict" over the Surgeon General's warnings. And he relied upon the refutations by the tobacco industry. It was only much later that Boeken discovered there was no "real" controversy. He testified that if Philip Morris had made the real risk of lung cancer and death clear to him in the 1960s, when Philip Morris was instead creating a false controversy with regard to the Surgeon General's report, he would have quit smoking.

In the 1970s, Boeken heard through various news media that tobacco companies claimed that there was no proof or scientific fact that smoking caused cancer, emphysema, or any other lung or blood disease. He trusted them, and believed the harm was being overstated by others. Other than advertisements, however, he could not recall particular statements made by tobacco companies until much later, when tobacco executives falsely testified before Congress in 1994.

By the 1970s, he knew that cigarettes were addictive, and that he was addicted, but he believed the statements by the industry that there was no health risk. The first time that Boeken knew that smoking could cause a catastrophic illness was around 1976, when he had his gallbladder removed, and the doctor told him he could get emphysema. He consulted another doctor, who said, "Forget it. You don't have emphysema. He was playing with you."

Boeken tried to stop smoking several times over the years. The first time was in 1967, when his girlfriend gave him an ultimatum. He did not want to lose her, so he stopped; but three or four weeks later, he started again, and she left him.

Boeken tried to quit again in 1976, at the beginning of what he termed, "the health craze," when jogging became popular. He wanted to jog too, and he started lifting weights, but he felt he needed stronger "wind." He was unable to stop smoking, however, due to withdrawal and cravings. His withdrawal symptoms consisted of a bad attitude, nastiness, anger, and a huge appetite. He became edgy and snappy, with inappropriate angry reactions.

In 1980, Boeken tried hypnosis to quit. He succeeded for 30 or 40 days, the longest time ever, but he was a "nervous wreck." His first relapse, a cigarette smoked with a cup of coffee, felt like "the best thing that ever happened" to him.

In 1982, Boeken attended a Smoke Enders course for three or four weeks, attending three or four times a week. And in 1986 or 1987, he joined Smokers

Anonymous, a 12-step program. He was motivated to quit by more frequent bouts of bronchitis, as well as a continuing desire to run, but he claimed that he still did not know that smoking caused lung cancer. Boeken tried Nicorette gum on more than one occasion, and patches, sometimes both at the same time, but he failed to quit.

After a three-month heroin addiction in the late 1960s, Boeken entered a methadone maintenance program, and quit methadone within three years. In the mid-seventies, Boeken went to Alcoholics Anonymous and stopped drinking in nine months. But he has never been successful at quitting smoking.

In 1981 or 1982, thinking it would lessen his bronchitis, Boeken switched to Marlboro "Lights," because they were lower in tar and nicotine, and "milder." As soon as Philip Morris began to market Marlboro "Ultralights," he switched to those.

In 1994, Boeken's mother, who smoked two packs a day until her death, died of lung cancer, and he had no more doubts about whether smoking caused cancer. On the news later the same year, Boeken saw portions of the testimony of tobacco company executives before Congress. They all denied that tobacco was addictive or harmful. They all denied under oath that it caused cancer. He knew they were lying about the cancer, but it was much later that he learned for the first time that accelerants, additives, or chemicals were added to the tobacco in his cigarettes, in order to increase their addictiveness.

Even then, Boeken was still unable to quit. In October 1999, he was diagnosed with lung cancer and underwent extremely painful surgery to remove the upper part of a lung, and then he began chemotherapy. By that time, however, the cancer had spread to his lymph nodes, and his chance of surviving the disease was less than one percent. Within a year, the cancer had spread to his brain, and there was no chance of survival.

Boeken stopped smoking just before the surgery to remove part of his lung, but started taking an occasional puff or two after the first round of chemotherapy was over, because it calmed him. But he was shattered when he was diagnosed with brain cancer, and felt he needed more, so he bought a pack of Marlboro Reds, and was soon smoking two or three packs a day.

Boeken testified that if Philip Morris had made it clear to him in the 1960s, the 1970s, or even the 1980s, that cigarettes cause lung cancer and death, he would not have smoked. At least, he thought he would have made an "honest effort" to quit. He also felt that if Philip Morris had admitted in the 1960s or 1970s, not only that smoking caused lung cancer, but also that Philip Morris added ingredients to Marlboro cigarettes in order to increase their addictiveness, he would have stopped smoking Marlboros.

Even before Boeken became a target member of a group of addicted smokers, Philip Morris targeted Boeken as a member of another group -- adolescent boys. Until 1955, Marlboro was marketed primarily to women smokers. At that time, Philip Morris began to reposition the brand as masculine. From the mid-to-late 1950s, its ads featured a handsome, virile, tough and independent-looking young man with a tattoo, looking as though he could be a dashing movie star, a detective, a sailor, or a cowboy -- the "Marlboro Man."

Marvin Goldberg, Ph.D., Boeken's marketing, advertising, and consumer behavior expert, explained how such advertising exerts a particularly powerful influence upon adolescent boys. He concluded from a review of Philip Morris's advertisements that they were intended to target young males from 10 to 18 years old, beginning in 1955. And, in Goldberg's opinion, the ads were aimed at young male "starters," first-time smokers.

Goldberg testified that child development literature suggests that young adolescents are just developing their self-concept, and that they are very self-

conscious. They feel that others are equally conscious of them, and want to appear to be mature, strong, independent, and masculine. If they see that a self-confidant, virile, and handsome man is smoking a certain brand of cigarette, they are likely to conclude that if they smoke that brand, they will look less fragile and vulnerable than they really are. And when their peers do the same, the cigarette brand acts as a badge and a magnet.

Philip Morris advertised on popular family television shows in the 1950s and 1960s, such as "I Love Lucy," the most popular show in 1955. Other popular prime-time shows on which it advertised were "Red Skelton" and "Jackie Gleason," both comedy shows, "Rawhide," a western, "Perry Mason," a detective show, "Route 66," an adventure drama, and "Alfred Hitchcock" and "East Side West Side," suspense and mystery shows. "Rawhide" and "Route 66" involved characters similar to the masculine images in the ads of that period.

Television advertising has been shown to be very effective, particularly with children. And more than 30 percent of the audience for such shows as "Red Skelton" and "Jackie Gleason" consisted of children, well above the percentage of children in the population.

With this evidence in mind, we return to Philip Morris's contention that Boeken's fraud claim failed because he could not recall a *particular* advertisement that made him decide to smoke.

Goldberg testified that Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking. Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become

familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do."

And, as the Supreme Court recognized in *Mirkin*, as well as prior to *Mirkin*, "'[c]hildren in particular are unlikely to recall the specific advertisements which led them to desire a product. . . .' [Citation.]" (*Mirkin*, *supra*, 5 Cal.4th at p. 1099, quoting *Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 219.) Boeken's testimony bears this out. Boeken started smoking at the age of ten, occasionally sneaking butts from ashtrays. At the age of 12, he made play cigarettes from gum sticks, rolling them lengthwise. When he was thirteen years old, he began to smoke whole, real cigarettes. He did it because "everybody smoked. All adults smoked. It was fashionable. It was sophisticated. It was cool. It was adult. . . . Sports figures smoked. Race car drivers smoked. Everybody smoked. . . . All the kids smoked." Boeken wanted to be grown up. He was at "that age," and "that was the thing to do."

He wanted to smoke even though it was not pleasurable at first -- it caused him to feel dizzy, faint, and to cough, and he had to "train" himself to inhale. At first, he smoked whatever brand he could get his hands on, and then he discovered vending machines, which allowed him to pick the brand he wanted. He used the vending machines in the coffee shops across from his junior high and high schools, where a pack of cigarettes cost only 25 cents and no one interfered.

With the discovery of vending machines, Boeken was able to buy a particular brand, and he chose Marlboros, because "[t]hey were everywhere. They advertised everywhere." It was the cigarette of choice in his social set, his culture, and all his friends smoked Marlboros. Marlboro ads seemed to be everywhere -- at baseball games, sporting events, racing events, and on racing cars. Boeken testified, "I was visually inundated with this brand of cigarette." And he was "impressed by the ads," although he could not recall anything about any particular ads between 1957 and 1960. And no particular advertisement came to mind as a factor in his decision to smoke.

To Boeken, Marlboros represented a very macho, sophisticated, hip way of smoking. He perceived a message that it was the one and only cigarette to smoke. Boeken remembered the 1950s and 1960s as the age of Playboy Magazine, sophistication, machismo, and doing manly things, like smoking cigarettes.

In that era, Boeken thought of himself as a "real guy." At the time of his testimony, Boeken picked out several advertisements from the 1960s that looked familiar to him. He remembered the "Marlboro Country" ads, and the slogan, "Come to where the flavor is." Boeken also remembered billboards showing the "Marlboro man" with his lasso, and another with a healthy looking model in great shape jumping over a fence with one hand. Boeken thought that the healthy and robust images in the cowboy ads implied that Marlboros were good for you.

He thought the Marlboro man was a "man's man," like his hero, John Wayne. Boeken rode a motorcycle -- his equivalent of John Wayne's horse, and in 1966, at the age 21, he rode around Europe on his motorcycle.

Over the years, another brand's ad campaign occasionally caught Boeken's attention, and he tried it for a few days, but always returned to Marlboros, although he was not sure exactly why. He knew he liked the taste better than other cigarettes -- they were smoother, yet stronger.

Thus, Boeken started smoking Marlboros as a child for reasons that track Philip Morris's advertising of the time, and he remembered their themes with fair certainty, as well as how they enticed him to smoke with false images of health, sophistication, and machismo.

"Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, credible and of solid value. [Citations.]" (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142.) We conclude that the evidence of Boeken's actual reliance on Philip Morris's fraud meets this test.

3. *Substantial Evidence Supports a Justifiable Reliance Finding*

Philip Morris contends that Boeken's reliance upon its fraud was unreasonable and therefore, it suggests, unjustifiable as a matter of law. In support of this contention, Philip Morris relies in part upon Ohio law, as interpreted by a federal trial court in an unpublished memorandum opinion, *Glassner v. R.J. Reynolds Tobacco Co*. (N.D. Ohio Jun. 29, 1999) 1999 WL 33591006. Philip Morris claims that the federal court of appeals in *Glassner v. R.J. Reynolds Tobacco Co*. (6th Cir. 2000) 223 F.3d 343 affirmed the trial court's ruling that as a matter of law, evidence of common knowledge of the dangers of smoking *requires* a finding that reliance on the tobacco companies' fraud is unjustifiable. Philip Morris misreads the appellate opinion. While the court of appeals affirmed the judgment, it expressly disagreed with the district court's ruling on justifiable reliance. (See *id*. at p. 353.)

Philip Morris also relies upon Massachusetts law, as interpreted by a federal trial court. (E.g., *Massachusetts Lab. Health & Wel. v. Philip Morris* (D.Mass. 1999) 62 F.Supp.2d 236, 244.) That court held that the facts alleged in the

complaint filed by a union trust fund did not amount to justifiable reliance as a matter of law, but applied the same objective standard of reasonableness to both intentional misrepresentations and negligent misrepresentations. (See *id*. at p. 244.)

Under California law, which controls in this case, whether reliance was reasonable is a question of *fact* for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) Further, under California law, whether reliance is reasonable in an *intentional* fraud case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.)

"Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. [Citations.] 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' [Citation.] If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. [Citations.] 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth. . . .' [Citation.]" (*Seeger v. Odell, supra*, 18 Cal.2d at p. 415.)

Thus, whether Boeken's reliance upon Philip Morris's fraud was justifiable requires a factual inquiry. Nevertheless Philip Morris has failed to summarize the facts essential to such an inquiry.

As we have discussed, it is presumed that the evidence is sufficient to support the jury's factual findings, and it is the appellant's burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

And in furtherance of that burden, the appellant must fairly summarize the facts in the light favorable to the judgment. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) Philip Morris's failure to do so has resulted in a forfeiture of this contention, as well. (See *ibid*.)

Beyond that, substantial evidence supports a finding that Boeken's reliance was justifiable. Boeken testified that his belief in the tobacco companies, rather than the Surgeon General, was wishful thinking or naïveté. But he had believed in the honesty of "big business." Further, Philip Morris had studied and understood nicotine addiction, and from the facts we have previously summarized, it is reasonable to infer that it knew and intended that addicted smokers would use its misrepresentations and misleading statements to engage in denial and rationalization; and moreover, that smokers' ignorance of the increased addictiveness of Philip Morris's Marlboro brand would keep them smoking Marlboros and *ensure* their reliance upon such denial and rationalization.

4. *Product Liability*

We note, and Boeken points out in his brief, that Philip Morris has made no contention or argument in its opening brief with regard to the sufficiency of the evidence supporting the jury's verdict of product liability. The only contention made by Philip Morris in its opening brief with regard to the sufficiency of the evidence to support the product-liability claim was, in reality, a claim of instructional error, which we shall discuss in the next section.

Philip Morris raises a substantial evidence contention with regard to product liability for the first time in its reply brief. An assignment of error must be made in the opening brief, or it may be deemed waived. (See *Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584.) Philip Morris would have us find that it did, in fact, raise the issue in its opening brief, reasoning that by addressing the

sufficiency of the evidence to support a finding of fraudulent concealment, it necessarily addressed a failure to warn of the dangers of its product.[13] Philip Morris offers no authority or reasoned argument, however, for the suggestion that a failure to prove the elements of fraudulent concealment is necessarily fatal to a cause of action for product liability; and for this additional reason, we need not reach it. (See *Estate of Randall* (1924) 194 Cal. 725, 728-729.)

Notwithstanding the failure of Philip Morris to raise the issue in the opening brief, we have reviewed the record and we find sufficient evidence to support a product liability judgment.

The consumer expectations test is satisfied when the evidence shows that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co*. (1978) 20 Cal.3d 413, 429.) Some degree of misuse and abuse of the product is foreseeable. (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833.)

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[13] Since we have found that substantial evidence supports the fraud verdict, even if there were insufficient evidence to support a claim for product liability the judgment would not have to be reversed. Although denominated, "special verdict," the verdict in this case was a general one, since it contained no findings of fact, and did not leave the judgment to the court. (*Shaw v. Hughes Aircraft Co*. (2000) 83 Cal.App.4th 1336, 1347, fn. 7; Code Civ. Proc., §§ 624, 625.) "'[W]here several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues.' [Citation.]" (*Mouchette v. Board of Education* (1990) 217 Cal.App.3d 303, 315, disapproved on another ground in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6; see also, *Henderson v. Harnischfeger Corp*. (1974) 12 Cal.3d 663, 673.)

Dr. Benowitz testified that Marlboro "Lights" and "Ultralights" are not light at all, since they deliver more than 0.1 milligram nicotine and more than 1 milligram tar per cigarette to human smokers who *compensate*. Compensation occurs when the smoker adjusts the way he or she smokes in order to get a satisfying amount of nicotine, by covering the holes in the filter, sucking harder, drawing the smoke further into the lungs, and keeping it in longer.

Benowitz testified that studies have shown that most smokers believe that light cigarettes are safer than regular cigarettes, and the majority of smokers do not know that they compensate. Compensation by smokers draws carcinogens further into the lungs, which is more likely to cause adenocarcinoma of the lung, a more aggressive form of cancer than those more prevalent among smokers of regular strength cigarettes.

Philip Morris suggests that the consumer expectations test is, in essence, one for failure to warn, and therefore preempted by the Public Health Cigarette Smoking Act of 1969.[14] Again, we disagree. Product liability under a failure-to-warn theory is a distinct cause of action from one under the consumer expectation test. (*Arnold v. Dow Chemical Co*. (2001) 91 Cal.App.4th 698, 717.)[15]

We turn to Philip Morris's claims of instructional error.

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[14] See a more detailed discussion of the 1969 Act, within.

[15] Since smokers do not know they compensate, a warning may not make the product any safer. Philip Morris's own expert, Dr. Richard Carchmann, admitted that the only way to reduce the risk is to quit smoking.

5. *Civil Code section 1714.45*

Philip Morris contends that Boeken was not entitled to a finding of product liability, whether measured under the "risk-benefit" test or the "consumer expectations" test, and that the trial court erred in instructing with BAJI No. 9.00.5 instead of 9.00.6.[16]

We note that Philip Morris's request for BAJI No. 9.00.6 was made in a motion in limine relating to Civil Code section 1714.45, and it was apparently withdrawn, as we discuss within, with no indication in the record that the request was renewed later. '"'"In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion." [Citations.]' [Citation.]" (*Finn v. G.D. Searle & Co*. (1984) 35 Cal.3d 691, 701.) Nor is the trial court required to give an instruction that a party has withdrawn. (See *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (*Soule*).)

Philip Morris contends that Boeken failed to prove the elements of product liability, because "[a] defendant . . . may not be held liable for selling a legal product merely because that product is inherently dangerous." Philip Morris cites BAJI No. 9.00.6 as the only authority for this contention. BAJI No. 9.00.6 is derived from the former version of Civil Code section 1714.45, which provided

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[16] BAJI No. 9.00.6 reads: "The (manufacturer or seller) of a product is not liable for [injuries] [death] caused by a defect in its design, which existed when the product left the possession of the (manufacturer or seller), if: [¶] 1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and [¶] 2. The product is a common consumer product intended for personal consumption."

cigarette manufacturers with immunity from product liability actions.[17] (Stats. 1987, ch. 1498, § 3, p. 5778; see *Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 837 (*Myers*).) Before we discuss the instructional issues, we must first address the history of the immunity statute.

The statue was originally passed in 1987 and, as pertinent, provided: "In a product liability action, a manufacturer or seller shall not be liable if: [¶] (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and [¶] (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts." (Italics added.)

Thus, as originally enacted in 1987, the statute's enumerated examples of common consumer products included tobacco. (See Stats. 1987, ch. 1498, § 3, p. 5778; *Naegele v. R.J. Reynolds Tobacco Co*. (2002) 28 Cal.4th 856, 860-862 (*Naegele*).) It was based upon the position taken in Comment i of Section 402A of the Restatement (Second) of Torts, that "'a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, <u>in an unadulterated form</u>, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.' [Citation.]" (*Naegele, supra*, 28 Cal.4th at p. 864, italics in the original, underlining ours.)

In 1997, the Legislature amended section 1714.45 to rescind the statutory immunity for tobacco companies as of January 1, 1998. (Stats. 1997, ch. 570, § 1; see *Myers*, *supra*, 28 Cal.4th at pp. 832-833, 837.) Thus, "while the Immunity

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[17] We shall hereinafter refer to the statute as section 1714.45 or "the immunity statute."

Statute was in effect -- from January 1, 1988, through December 31, 1997 -- no tortious liability attached to a tobacco company's production and distribution of pure *and unadulterated* tobacco products to smokers. [Citations.]" (*Myers*, *supra*, at p. 840, italics added.)

The statute was expressly retroactive, and while it was in effect it immunized tobacco manufacturers from liability for conduct before, as well as during the ten-year period. (*Myers*, *supra*, 28 Cal.4th at p. 847; *Souders v. Philip Morris Inc*. (2002) 104 Cal.App.4th 15, 24, fn. 7.) Once it was repealed, however, the statute's retroactive effect was nullified, and tobacco companies were no longer immune to liability for conduct occurring prior to 1988.[18] (*Myers*, *supra*, 28 Cal.4th at p. 847.) Therefore, at the time of trial in 2001, BAJI No. 9.00.6 no longer applied to cigarettes. (See Comment to BAJI No. 9.00.6 (Jan. ed. 2004); Stats. 1997, ch. 570 (S.B. 67), § 1.)

Neither *Myers* nor *Naegele* had been decided when Philip Morris filed its opening brief. Consistent with the law before those cases were decided, in its opening brief, Philip Morris argued that repeal of the original section 1714.45 did not nullify its retroactivity, and that it retained immunity from liability that would otherwise have arisen not only prior to 1998, but also prior to the statute's passage in 1987. Before Philip Morris filed its reply brief, *Naegele* and *Myers* were published. *Myers* held that the immunity statute applied to tobacco only during the ten years beginning January 1, 1988 and ending December 31, 1997. (*Myers*,

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[18] In *Myers*, the Ninth Circuit Court of Appeals had certified the following question to the California Supreme Court: "'Do the amendments to Cal. Civ. Code § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998, but which is based on conduct that occurred prior to January 1, 1998?'" (*Myers*, *supra*, 28 Cal.4th at p. 839.)

supra, 28 Cal.4th at p. 837.) *Naegele* confirmed this and also held that the protection of the ten-year immunity statute did not "extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (*Naegele, supra*, 28 Cal.4th at p. 861.)

Although Philip Morris addressed *Naegele* and *Myers* in its reply brief, we permitted it to file a supplemental opening brief. For the first time in its supplemental brief, Philip Morris claims that it requested and submitted a jury instruction that would have limited its liability for any wrongs committed during the ten-year immunity period, proposed instruction O.

Philip Morris's packet of proposed jury instructions, filed on May 16, 2001, included that proposed instruction, which reads:

> "You may not find defendant liable on plaintiff's claims of design defect, negligence, fraud and conspiracy or failure to warn based on anything that defendant did or did not do between January 1, 1988, and December 31, 1997. It was the policy of California during that period to recognize cigarettes as inherently unsafe products that could nevertheless be lawfully sold because they carried adequate warnings regarding their dangers, and to encourage the continued availability of cigarettes and other tobacco products to those adult consumers who wished to use them. This was accomplished by a law that protected producers or suppliers of cigarettes or other tobacco products from legal responsibility for harms suffered by those who voluntarily consumed such products. That law was repealed as of January 1, 1998, and has no legal effect with respect to conduct since that date, and also has no legal effect with respect to plaintiff's claim for breach of express warranty."

The problem we have is that we have found no ruling by the trial court rejecting this instruction. The instruction conference was unreported. We did find a cover sheet signed by the trial judge, and file-stamped June 6, 2001, which is entitled, "Instructions -- Refused Withdrawn, Consisting of 10 pages herein." But the ten pages are not attached, unless the cover sheet was meant to refer to the ten pages attached to the document immediately following it in the Clerk's Transcript.

The document immediately following the trial court's cover sheet is entitled, "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant." The ten pages that follow contain seven proposed instructions. Proposed Instruction O is not among them.

We requested Philip Morris to provide us with the exact page numbers in the appellate record where the trial court's refusal to give its proposed Instruction O might be found, or to augment the record with a copy of the trial court's minute order or additional reporter's transcript, if any, showing the refusal, or to inform this court if there was no such order or ruling.

Rather than directly respond to our request, Philip Morris filed a letter brief suggesting that we must assume that the instructions were proposed and rejected, *because the record is silent* with regard to an express ruling, and the instruction conference was in chambers. As authority for its suggestion, Philip Morris states that it knows of no authority to the contrary.

In fact, there is no shortage of authority to the contrary. It is well established that error cannot be presumed, and it is the appellant's burden to provide a record sufficient to show the asserted error. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.)

Philip Morris also filed a motion to augment the record, but not with an agreed or settled statement reflecting the in camera instruction conference or any ruling on the instructions. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In*

re Kathy P. (1979) 25 Cal.3d 91, 102; Cal. Rules of Court, rules 6, 7, 12(a).) Instead, Philip Morris seeks to augment the record with the trial court's statement of decision regarding Philip Morris's pretrial motion for summary adjudication, in an attempt to show that requesting an instruction or a ruling on the supposedly proposed instruction would have been futile, because the trial court had already ruled against it on that issue.

We grant the motion, because the statement of decision was part of the trial court record, but find it ineffective for Philip Morris's purpose. Philip Morris did not raise the issue of partial retroactivity or a ten-year immunity period in its motion for summary adjudication, and the statement of decision addressed only Philip Morris's claim of immunity for all pre-1998 conduct, not just conduct from 1988 to 1998.

The judgment is presumed correct, and error is never presumed. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) A claim of error by a party who fails to provide the record necessary to determine upon what basis the trial court made its order must be resolved against that party. (*Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295.) And we must presume that the basis upon which the trial court made its order was a proper one. (*Rossiter v. Benoit*, *supra*, 88 Cal.App.3d at p. 712.)

We presume, therefore, that Philip Morris abandoned, either expressly or implicitly, its request for Proposed Instruction No. O. This presumption is consistent with the legal position asserted by Philip Morris at trial and through its opening brief on appeal: that the statute immunized it from liability for all conduct prior to January 1, 1998, including all conduct preceding January 1, 1988, not just for the ten year period the statute was in force. A party is not entitled to instructions with regard to a theory or defense that the party has *not advanced*. (See *Soule v. General Motors Corp*., *supra*, 8 Cal.4th at p. 572.)

We also note that instruction O was incomplete because it did not incorporate the term "unadulterated" within its language. Philip Morris argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may, as he did here, properly refuse it. [Citations.]" (*Truman v. Thomas* (1980) 27 Cal.3d 285, 301.)

Philip Morris states in its reply brief that "there is no evidence that Philip Morris, during the 1960s or at any other time, was adding things to Marlboro cigarettes . . . for the purpose of addicting plaintiff or any other smoker." In fact, there is more than ample evidence in the record that Philip Morris incorporated additives that not only increased the risk of harm from nicotine, but also created harmful effects not inherent in smoking unadulterated tobacco, thereby eliminating any immunity Philip Morris might otherwise have enjoyed from 1988 to 1998. (See *Naegele*, *supra*, 28 Cal.4th at pp. 864-865; *Myers*, *supra*, 28 Cal.4th at p. 837.)

Philip Morris's own expert, Dr. Carchmann, who had been employed by Philip Morris for ten years, admitted that Philip Morris adds compounds, such as urea, that release ammonia in the tobacco, and flavorings, such as chocolate and licorice, although he claimed that it was done only to enhance flavor and sensation to smoking, and he denied that it had any adverse effect.

Benowitz testified that ammonia raises the alkaline level, or PH, of tobacco, and the higher the PH, the more free-base nicotine is delivered to the smoker. Contrary to Philip Morris's contention that there was no evidence showing that ammonia causes any negative health effect beyond those inherent in tobacco, or that it makes tobacco more addictive, Philip Morris's former director of applied research in its research and development department, Dr. Farone, testified that

although nicotine does not cause cancer, it does have harmful effects on the nervous system. Dr. Mele testified that nicotine has adverse cardiovascular effects, raising the heart rate and blood pressure.

Farone testified that urea, which turns to ammonia, was added by Philip Morris to its cigarettes in order to create *more* nicotine. A thorough explanation of the ill effects of nicotine was provided by Benowitz, whose research over the past 25 years has been into the effects of nicotine, nicotine addiction, smoking behavior, and smoking-related illnesses. Nicotine is similar to the hormone, ACH, which is responsible for nerve communication, and is highly concentrated in the brain.[19] ACH binds to receptors, proteins, which results in the release of other hormones that affect mood and behavior.

One of the hormones released when a receptor is activated is dopamine, which causes pleasure. Other hormones stimulate and help concentration; still others act like an anti-depressant; while others control the appetite. Nicotine attaches to the same receptors, but in larger amounts, and activates them to a greater extent. Smoking controls mood and behavior in this way, and since smoking delivers nicotine directly from the lungs to the heart and brain, it achieves its effect in seconds. Since immediate reinforcement encourages addiction, smoking is the delivery system that causes the fastest addiction. The smoker's brain is never the same as a never-smoker, even after he manages to quit.

The *more nicotine delivered* to the brain, the more the receptors are stimulated, increasing the smoker's tolerance as the brain tries to normalize. Eventually, the structure of the brain changes, and smokers develop more and more nicotine receptors. Farone testified that adding urea causes *more* nicotine to be

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[19] See footnote 4, *ante*.

delivered by the gas produced by smoking each cigarette, thus increasing Marlboro's effectiveness and speed in causing addiction.

Philip Morris claims that Benowitz testified that there was no evidence that ammonia causes any negative health effects, but its argument is not only incorrect, it is also very misleading. Philip Morris refers to Benowitz's testimony in which he merely said that he had not *reviewed* any published research relating to Farone's nicotine displacement theory. Philip Morris ignores Farone's testimony that adding urea increases ammonia, which in turn "pushes" more nicotine into the smoke.

The evidence also established, contrary to Philip Morris's assertions, that additives contributed to Boeken's lung cancer. By the age of 14, Boeken smoked every day, at least two packs a day, and continued for 40 years, unable to quit for more than a brief period even after he was diagnosed with lung cancer. According to Benowitz, Boeken was not just addicted to cigarettes, he was highly addicted. The increased ammonia had done its job of addicting more effectively and more quickly.

Further, Farone testified that 20 percent of the contents of a cigarette consists of added flavorings. Flavorings such as chocolate and licorice are not added simply to improve the taste, but also to make it easier to inhale the smoke by creating bronchodilators, which open up the lungs. Cigarettes that are easier to smoke allow carcinogens to reach deeper into the lungs, which can lead to adenocarcinoma, the very aggressive and fast-spreading cancer from which Boeken suffered.

Epidemiologist and oncologist, Gary Strauss, explained that when cigarettes are more irritating, people do not inhale deeply, and the central part of the lungs is the area primarily exposed to cancer-causing particulates. The more deadly adenocarcinomas, however, grow in the periphery, that is, the end of the lung,

reached by deeper inhaling. The incidence of these cancers has increased in recent years and that increase is attributable to low-tar cigarettes.

Even if Philip Morris did not withdraw Proposed Instruction O, and the court refused to give the instruction, the court did not err.

6. *Federal Preemption Contentions*

Philip Morris contends that certain evidence, argument, and claims were preempted by the Public Health Cigarette Smoking Act of 1969, and that the trial court failed to instruct the jury properly "on this point." Its contentions are twofold: (1) the trial court erred by refusing to "instruct the jury, as Philip Morris requested, that it could not hold Philip Morris liable on the ground that its post-1969 advertising contained supposedly 'glamorous' and 'healthy' imagery"; and (2) that the trial court erroneously "admitted, over Philip Morris's objection, evidence that Philip Morris's advertising contained such imagery."

The 1969 Act requires a particular warning, or a variation of it, to appear in a conspicuous place on every package of cigarettes sold in the United States. (15 U.S.C. § 1333; see generally, *Cipollone v. Liggett Group, Inc., supra*, 505 U.S. at pp. 515-518, 525 (*Cipollone*).) It also explicitly reserves authority to The Federal Trade Commission to identify and punish deceptive advertising practices relating to smoking and health. (*Cipollone*, *supra*, at p. 529; 15 U.S.C. § 1336.) The United States Supreme Court has construed the 1969 Act as preempting damage claims based upon a failure-to-warn theory that requires a showing that post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, or that its advertising tended to minimize or neutralize the health hazards associated with smoking. (*Cipollone v. Liggett Group, Inc*., *supra*, 505 U.S. at pp. 524, 527-528.)

Philip Morris claims that it requested two instructions relating to federally preempted advertising, and that the trial court refused both requests. The first of the two instructions at issue was requested *orally* during the testimony of Boeken's expert on nicotine addition, Benowitz. Philip Morris has summarized neither the testimony nor its discussion with the court, has not put its request for this instruction in context, and has not summarized the court's ruling, which was not simply a refusal to give a requested instruction, as we shall explain. We begin with a summary of the relevant portions of the record.

Philip Morris objected during Benowitz's testimony regarding the use of healthy, sexy, happy models in advertisements, and moved for a mistrial. The court disagreed with that characterization of the testimony, and denied the mistrial, but offered to instruct the jury to disregard whatever it had heard from this particular witness with regard to advertisements. Philip Morris's counsel, Mr. Leiter, replied, "We would ask that the court affirmatively instruct the jury that it may not find liability in this case based on any accusation or any evidence that healthy images in ads undercut the health warnings mandated by the Congress." The court refused to give this specifically requested language. But contrary to Philip Morris's suggestion that no instruction was given on the issue, the court did instruct as follows: "Ladies and gentlemen, just before we took the break, there was some testimony from this witness regarding certain advertising images and their potential effects. You'll recall that testimony. [¶] I instruct you at this time that with respect to that testimony, I want you to *disregard it for all purposes and do not use it for any purpose whatsoever* in this trial." (Italics added.)

Since Philip Morris has referred to nothing to the contrary, we presume the jury followed the court's instruction. (See *People v. Harris* (1994) 9 Cal.4th 407, 426.)

The second instruction that Philip Morris claims the court erroneously refused was its proposed instruction J. It reads as follows:

> "Regardless of any of the other rules of law set forth in these instructions, you must follow the rules of federal law which I shall now give you.
>
> "Because of federal law, you cannot hold defendant liable on the basis that after July 1, 1969, it should have included additional or more clearly-stated warnings in the advertising or promotion of [its] cigarettes because, as a matter of federal law, after July 1, 1969, defendant adequately warned plaintiff of the health risks of smoking, including 'addiction.'
>
> "Also because of federal law, and except only as stated below, you cannot hold defendant liable on the basis that it:
>
> "(a) through its advertising or promotional practices, neutralized, minimized, or undermined the effect of the federally mandated warnings appearing on every cigarette package after July 1, 1969, or
>
> "(b) after July 1, 1969, failed to disclose, or concealed, or suppressed information about the health risks of smoking including 'addiction.'
>
> "The federal law does not limit the potential liability of defendant against claims that its product was defective in design in other respects, or that the defendant was negligent in other respects in the design of their product. The federal law also does not limit the potential liability of defendant against claims that it made affirmative misrepresentations about the health risks of smoking."

As with Proposed Instruction No. O, we find no ruling by the trial court rejecting this instruction. Our request for a citation to the record for the trial court's purported refusal of Instruction No. O also included a request for a citation

to the court's purported refusal of Philip Morris's proposed Instruction No. J. Philip Morris has provided no such citation, and has not attempted to augment the record with an agreed or settled statement. (See *Maria P. v. Riles*, *supra*, 43 Cal.3d at p. 1295; *In re Kathy P.*, *supra*, 25 Cal.3d at p. 102; Cal. Rules of Court, rules 6, 7, 12(a).) But we did find Proposed Instruction J in the group of instructions under cover of the "Objections of Defendant Philip Morris Incorporated to Court's Rejection of Certain Jury Instructions Proposed by Defendant."

If the trial court did, in fact, refuse Instruction No. J, Philip Morris has failed to demonstrate error. A trial court is not required to give instructions in the precise language proposed, and it is not error to refuse instructions that are not reasonably brief, concise, and understandable to the average juror. (*Dodge v. San Diego Electric Ry. Co*. (1949) 92 Cal.App.2d 759, 763-764.)

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] . . . Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor . . . of defendant' has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co*., *supra*, 92 Cal.App.2d at p. 764.) Instruction J suffered from all these infirmities, and the trial court had no duty to give it.

Philip Morris's second contention with regard to the 1969 Act is that the trial court erred in permitting Dr. Goldberg to testify at length and over its objection about preempted, post-1969 advertising. In that testimony, which took place on April 17, 2001, Goldberg referred to several exhibits which have not been made a

part of the record on appeal. He described them as advertisements that demonstrate an intent to market Marlboro cigarettes to adolescent males, and to turn youthful nonsmokers into smokers.

A judgment may not be reversed unless the record shows that the appellant made a timely objection to or a motion to exclude or to strike the evidence and that the specific ground of the objection or motion was stated. (Evid. Code, § 353, subd. (a).)

Philip Morris contends that its objection was made in its motion in limine No. 1, which stated a general objection to any and all evidence that might relate to preempted advertising. Philip Morris's motion in limine did not, however, specify any particular evidence to be excluded, and did not mention the Goldberg testimony about which it now complains.

A motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 188-190, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Thus, Philip Morris's motion in limine did not preserve the issue for appeal.

Philip Morris also contends that the court gave it a "running objection . . . to this whole area." The court allowed Philip Morris a "running objection" in a discussion which took place the day before the Goldberg testimony now in question, and although it does appear that the court may have been referring to evidence of preempted advertising, the discussion on that day was precipitated by Philip Morris's objection *on the ground of relevance* to testimony concerning the targeting of youthful smokers after Boeken became an adult. Philip Morris's counsel, Mr. Leiter, made it clear to the court that *he was not objecting to post-1969 youth-targeted advertising on the ground of federal preemption*.

On the day at issue, April 17, 2001, after Goldberg read an excerpt from an article about youth smoking, Leiter said, "Your Honor, may we have our standing objection," but he did not explain what standing objection he had in mind. The judge assented, apparently thinking that he understood to which objection counsel was referring, and he then took the matter up outside the jury's presence. The ensuing discussion began in relation to targeting youth smokers, and the court referred to a discussion of the subject the day before, April 16, 2001.

In the April 17 discussion, it was again the court that brought up the issue of preemption. Counsel for Boeken offered to stipulate to having the court strike the article from which Goldberg had read. Leiter responded that he would prefer a limiting instruction, either at that time or later in the trial, regarding the proper use of the testimony and warning against the improper use of it under *Cipollone*. The court agreed to give such an instruction once it had "an appropriately written jury instruction" before it. Leiter agreed, with the understanding that he continue to have "a standing objection to all such testimony." The court replied, "You do, you do," and ruled that the "current information with the exception of erosion type suggestions" was relevant to an understanding of what occurred in the 1950s, when Boeken started smoking.

Thus, it appears that Philip Morris did not object to the Goldberg testimony regarding post-1969 advertisements, and whatever its vague "running" or "standing" objection was, it did not comply with Evidence Code section 353, subdivision (a). (*People v. Morris*, *supra*, 53 Cal.3d at pp. 188-190.)

The testimony to which Philip Morris did object concerned an excerpt from an article regarding the targeting of youth smokers, and Philip Morris refused an offer to stipulate to the court's striking that testimony, agreeing instead upon a limiting instruction to be submitted in writing. Even if Philip Morris could bootstrap its objection to the reading of the article into an objection to the

testimony that preceded it, it may not complain on appeal about the admission of evidence that it induced the court not to strike. (See *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403.)

We conclude that Philip Morris has not preserved the issue for appeal. In any event, "[n]o judgment shall be set aside . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The burden is on Philip Morris, as appellant, to show that error has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co*., *supra*, 42 Cal.2d at p. 83.) Further, Philip Morris "bears the duty of spelling out in [its] brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Philip Morris's prejudice argument is apparently based upon factors suggested by the California Supreme Court to determine whether an error of instructional omission was prejudicial -- "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra,* 8 Cal.4th at pp. 580-581.)

But the only factor cited by Philip Morris that might have any merit, if the instruction had been erroneously refused, is its assertion with regard to the fourth factor -- an indication by the jury itself that it was misled. The closeness of the jury's verdict is such an indicator (see *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1070), and Philip Morris points out that there was a nine-to-three verdict with regard to failure to warn prior to July 1, 1969.

With regard to the first factor, however, although Philip Morris contends that Boeken "introduced a substantial amount of evidence . . . of supposedly glamorous

and healthy imagery in its post-1969 advertising," Philip Morris points only to the admission of the Goldberg testimony (to which Philip Morris did not object, as we have already discussed) regarding exhibits that have not been made a part of the record on appeal.

We must point out again that it is Philip Morris's burden to provide an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) When contentions are based upon exhibits that Philip Morris has not made a part of the record, it may be assumed that such contentions have been abandoned. (*Brown v. Copp* (1951) 105 Cal.App.2d 1, 8.)

Philip Morris has made no effort to discuss the second *Soule* factor -- the effect of other instructions. It does not summarize, discuss, or even mention the instructions that were given. Instead, it suggests that no instruction was given at all with regard to post-1969 advertising and promotion, with a misleading assertion that the "trial court issued no instruction that cured its failure to give Philip Morris's proposed instruction." In fact, the trial court instructed the jury regarding the 1969 limitations throughout its charge.

With regard to fraudulent concealment, the court instructed, "[F]ailure to disclose . . . is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose . . . prior to July 1, 1969." The special verdict form asked, "Prior to July 1, 1969, did defendant conceal or suppress a material fact?"

With regard to the product liability claim, the court instructed, "A product may be defective because of a defect in design or a failure to adequately warn the consumer prior to July 1, 1969"; and, "[A] product is defective if the manufacturer . . . has a duty to warn of dangers and fails to provide an adequate warning of those dangers prior to July 1, 1969, a date established by law in this case"; and, "A cigarette manufacturer has a duty to warn prior to July 1, 1969 if [etc.]"; and, "For

the period prior to July 1, 1969, one who supplied a product . . . has a duty to use reasonable care to give warning."

Further, the special verdict form asked, "Was there either (1) a defect in design, or (2) a defect resulting from a failure to warn occurring before July 1, 1969?"

Thus, the jury was not permitted, as Philip Morris contends, to base liability upon a failure to warn after July 1, 1969, or upon advertising that minimized or neutralized the federally mandated warning after that date.

With regard to the fourth *Soule* factor, the effect of counsel's arguments, Philip Morris complains that opposing counsel was permitted to argue that Philip Morris was the "'devil' because of its allegedly glamorous advertising practices"; that Philip Morris "'spent hundreds of millions and billions of dollars putting out advertising images to the exact contrary' of the dangers of smoking"; that "'Marlboro is on the side of Ferraris in Formula One Racing [and] guys, especially, who see themselves, adventurous or resourceful or strong go for that. Mr. Boeken did. He saw himself as that man."

If opposing counsel's argument tended to minimize or neutralize federally mandated warnings, it was incumbent upon Philip Morris to object and request that the jury be admonished. (See *Sabella v. Southern Pac. Co*. (1969) 70 Cal.2d 311, 318.) Since it did not do so, it waived any contention based upon improper argument. (*Id*. at p. 318; *Horn v. Atchison T. & S.F. Ry. Co*. (1964) 61 Cal.2d 602, 610.)

We conclude that Philip Morris has failed to meet its burden to show that the trial court erred by refusing its instructions, as well as its burden to show that any such refusal amounted to a miscarriage of justice.

7. *Impeachment with Felony Conviction*

Philip Morris contends that the trial court abused its discretion in refusing to allow it to impeach Boeken with a 1992 felony wire fraud conviction.

Boeken brought a motion in limine to exclude any reference to his three criminal convictions, one in 1972 for receiving stolen property, one in 1976 for possession of heroin, and the 1992 wire fraud conviction . For the latter, Boeken had been convicted after pleading guilty pursuant to a plea bargain to one count of wire fraud as an aider and abettor. (See 18 U.S.C. §§ 1343, 2(a).) He admitted having sold a fraudulent investment in 1987 while employed as a securities salesman.

The motion in limine was granted *without* prejudice, after which the following exchange occurred:

> "THE COURT: At this time, what I will do is I will grant the motion in limine in its entirety as to the felony convictions and they will not be admitted for any purpose, nor will counsel refer to it in any way, either directly or indirectly, through counsel or through any witnesses that may take the stand.
>
> "It's without prejudice.
>
> "If we get very far into any character issues --
>
> "MR. LEITER: And by suggesting we defer it, I hadn't anticipated Your Honor was going to rule.
>
> "THE COURT: I know you did.
>
> "MR. LEITER: Obviously, credibility of the plaintiff is a key issue in the case. Income is a key issue in the case. And the conviction goes to both. And we would like to be heard on both of those issues, either now or at the appropriate time.

"THE COURT: All I can say to you is that I am certainly willing to listen. But based on the information that I have at the present time that's been presented to me in this motion in limine, I looked at it, I thought about it long and hard, balanced the 352 issues, it turns out from what I have seen so far, I am satisfied that I made -- that my instincts led me in the right direction and it was correct not to admit this evidence and that it would have been the very effects that 352 is designed to prevent occurring in a trial.

"But at the same time, I haven't seen everything, and there must be a certain amount of openness. But at the present time, this motion is granted."

Philip Morris did not raise the issue again until its motion for new trial. It now contends that the court abused its discretion in excluding the conviction, for three reasons: it was not too remote; fraud is probative on the issue of credibility; and Boeken's veracity was a "central issue."

The trial court's determination whether to admit or exclude a prior felony conviction for purposes of impeachment is made pursuant to Evidence Code section 352. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.) Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

An exercise of discretion under section 352 will be disturbed on appeal only if the trial court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

We agree that a fraud conviction is probative with regard to credibility. But Philip Morris has not shown that its exclusion was arbitrary, capricious, or patently

absurd, or that it resulted in a manifest miscarriage of justice. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) Notably absent from Philip Morris's argument is any contention that the probative value of the conviction might outweigh the obvious consumption of time that would have been taken up by the issue.

8. *Juror Misconduct*

Philip Morris contends that the trial court erred in removing a juror during deliberations.

The trial court's discretion to discharge a juror who refuses to deliberate is reviewed for abuse of discretion, and will be upheld if there is any substantial evidence supporting the ruling, so long as the juror's refusal to deliberate appears in the record as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

On the morning of May 23, 2001, one day into deliberations, the foreman sent out two notes to the judge stating, among other things: "We . . . need instruction regarding Juror # 5 . . . who is not participating in the discussion. She sits away from the table and reads her bible instead of contributing to the group conversation"; and, "Can we discuss the distraction regarding Juror # 5. . . . She is not seating [*sic*] with us during the discussion. She instead chooses to read her bible and does not contribute to the group conversation."[20]

In response to the note, the court reread to the jury the following excerpt from BAJI No. 15.52: "All jurors should participate in all deliberations."

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[20] The record is not clear on the timing and sequence of the various notes.

Later, the foreperson sent out another note. "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then questioned Juror No. 5 separately in chambers. She denied that she had been reading her Bible during deliberations, although she kept it in front of her. She admitted that she did not sit "all the way up" at the table, but denied that she sat away from the table, failed to listen, or slept during deliberations.

Juror No. 5 explained to the court that questions had been raised in the jury room about her addiction to morphine, and she found that avoiding eye contact helped her to avoid painful memories. She did this for "[her] own sanity." She then admitted that she had been sitting in the corner, explaining that she could not be expected to sit there and "giggly-gaggly play little games," because she was "not that hypocritical."

The trial judge urged Juror No. 5 to participate, to explain her concerns to the other jurors, and to ask them to be courteous, since they probably would attempt to get along if they understood her feelings. Juror No. 5 responded that she got along with individual jurors, but "now it is like them against me." The judge explained that deliberating means listening, sharing her views, and participating. Juror No. 5 replied, "I totally agree. I have attempted to do that." She agreed to go back in, talk to the other jurors, and to try to "square it away."

Later that day, however, the foreperson sent out another note, which read: "Wish to speak with the judge on a one and one basis regarding [Juror No. 5]. We feel that she is being disruptive and have [*sic*] shown animosity towards some of the jurors who has [*sic*] spoken to her regarding the reading and participation";

and, "Per the court's instruction, Juror No. 5 is still not willing to sit around the discussion table and participate. She chooses to continue to read her bible, and it is upsetting the other jurors. This distraction is making it difficult for us to deliberate. I and a few other jurors have spoke [*sic*] with [Juror No. 5] about this."

The court then undertook to question each juror individually in chambers. The judge was careful to caution each juror not to reveal the contents of deliberations, and asked for any comments about the information he had received regarding some difficulty concerning one of the jurors.

Juror No. 2 reported that the trouble began after Juror No. 5 became angry when she was not elected foreperson. It appeared to Juror No. 11 that Juror No. 5's personality totally changed once the foreperson was picked. Juror No. 6, the foreperson, reported that Juror No. 5 participated until she failed to win election as foreperson. She then became hostile, and warned Juror No. 6 that she would "shut it down" if she were not left alone.

Six jurors reported that Juror No. 5 would sit with her back turned against the other jurors, and Juror No. 5 admitted turning her chair around and sitting with her back to the other jurors on both days of deliberations.

Juror No. 1 reported that Juror No. 5 would not sit with the others, and that she either read her book or appeared to sleep during deliberations. Five more jurors reported either that Juror No. 5 appeared to be sleeping much of the time, or she sat with her eyes closed.

Jurors No. 7, 8, and 9 reported that Juror No. 5 never looked at the exhibits, and the latter two reported that she did not review her notes. Eleven jurors reported that Juror No. 5 read her book while the others deliberated. Juror No. 5 admitted that she read a novel (not the Bible) during deliberations, although she then claimed that she was not actually reading. Juror No. 11 thought that Juror No.

5 was, in fact, reading, since she smiled occasionally while looking at her book, and the smile obviously did not relate to any discussion among the other jurors.

Ignoring the reports we have just summarized, Philip Morris points to comments by several jurors, including Juror No. 5, which would have supported a contrary resolution of the issue by the trial court. But we must accept the trial court's resolution of credibility issues and factual conflicts, unless they are not supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

Many of the juror statements upon which Philip Morris relies consist of the jurors' impressions and opinions. For example, Philip Morris quotes Juror No. 12, who said, "I think she's paying attention because when she hears . . . things and when she's ready to apply her input, she does it." But Juror No. 12 could not say whether Juror No. 5 was giving her full attention, or whether she had been really reading, and surmised that she was just making a gesture, like turning her back. It was the function of the trial court, considering all the circumstances, to make that determination. (See *People v. Cleveland*, *supra*, 25 Cal.4th at p. 485; *People v. Nesler*, *supra*, 16 Cal.4th at p. 582.)

Philip Morris lists various other juror statements that would support a different decision. Juror No. 5 voted, and five jurors said either that she gave her input or that she voiced her opinion on several different occasions, perhaps as many as five or six. Juror No. 1 said, however, that Juror No. 5 would respond only to questions put directly to her. And according to Juror No. 7, those responses consisted only of answering "yes" or "no," or repeating, "I hear you, I hear you, I hear you," when any comments were made to her.

Philip Morris also points out that many of the jurors were not certain whether Juror No. 5 had actually been asleep when her eyes were closed. But Juror No. 2 told the court that Juror No. 5 appeared to be sleeping when her eyes were closed, because she would lean in her chair, sometimes all the way over one

side or the other. Juror No. 4 thought she was sleeping, because she closed her book and put her head down. Such physical indicia as eye closures, head nodding, and slumping in one's chair provide ample evidence of sleeping. (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

Philip Morris also attaches to its opening brief a declaration of Juror No. 5 dated June 7, 2001, and a letter from one of the other jurors, posted on the Internet on June 23, 2001. Since there has been no showing that either document was before the trial court at any time, we decline to consider them. (See *Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184-185, fn. 1.)

Philip Morris suggests that the facts of this case are similar to those of *People v. Bowers* (2001) 87 Cal.App.4th 722 (*Bowers*), which were held to justify a reversal. (See *id*. at p. 735.) We disagree. In *Bowers*, only one other juror reported that the discharged juror had slept, and there was no evidence of how long or how frequently. (*Id*. at p. 731.) Here, *all* the other jurors reported that Juror No. 5 appeared to sleep or read throughout the two days of deliberations.

In *Bowers*, behavior reported as inattentiveness consisted of the juror's habit of walking around with his arms crossed and refusing to respond, as a means of expressing that he did not agree with the other jurors' evaluation of the evidence. (*Bowers*, *supra*, 87 Cal.App.4th at pp. 730-731.) Here, substantial evidence established that Juror No. 5 separated herself physically from the other jurors, did not pay attention to their deliberations, and instead, slept or read a novel throughout the two days during which she was a member of the deliberating jury.

We conclude that such circumstances support a finding of a "demonstrable reality" that Juror No. 5 refused or was unable to deliberate, and that the trial court did not, therefore, abuse its discretion in discharging her. (See *People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.)

9. *Punitive Damages*

Philip Morris moved for a new trial on the jury's award of $3 billion in punitive damages. The trial court denied the motion, conditioned upon Boeken's acceptance of a reduction of punitive damages to $100 million. Boeken accepted the reduction.

Philip Morris contends that even the reduced punitive damage award is excessive, whether measured under California law or the United States Constitution. In her cross-appeal, Boeken contends that the trial court erred in reducing the award. We begin our review under the United States Constitution.

Punitive damage awards that are grossly excessive in relation to a state's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*BMW*).)

When it is asserted, as here, that an award is so grossly excessive as to violate due process, certain "guideposts" may provide meaningful assistance to the appellate court's review. (*BMW, supra*, 517 U.S. at pp. 574-575.) The *BMW* guideposts are "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

We independently apply the *BMW* guideposts to the facts to determine whether the award violates due process. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at pp. 439-440.) We defer, however, to the

express and implied factual findings of the jury, unless they are clearly erroneous. (*Id*. at p. 440, fn. 14.)[21]

The factor that provides the "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' [Citation.]" (*State Farm*, *supra*, 538 U.S. at p. 419, quoting *BMW, supra*, 517 U.S. at p. 575.) Several subsidiary factors guide the determination of the degree of reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm*, *supra*, 538 U.S. at p. 419; *BMW, supra*, 517 U.S. at pp. 576-577.)

"The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to

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[21] Since we conduct an independent review, we need not reach asserted errors in instructing with regard to punitive damages, such as Philip Morris's contention that the trial court should have instructed the jury "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred," as later required by the Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422 (*State Farm*), which had not yet been decided at the time of trial. (See *Romo v. Ford Motor Co*. (2003) 113 Cal.App.4th 738, 754.) If Boeken rejects our reduction of the punitive damage award, as explained within, we have no reason to assume that the trial court will not follow *State Farm*.

achieve punishment or deterrence. [Citation.]" (*State Farm*, *supra*, 538 U.S. at p. 419.)

In this case, each factor weighs in favor of the jury's conclusion that punitive damages were appropriate. The evidence supports the conclusion that the harms caused to Boeken by Philip Morris's fraud and defective product were physical, not merely economic. And Philip Morris's conduct was repeated over a period of almost 50 years with an indifference to the health or safety of Boeken, a physically and psychologically vulnerable target.

The product was marketed knowing that it was a dangerous product -- one that caused addiction and disease. Further, chemicals were added to the product to make it more addictive and easier to draw into the lungs, thus making it more dangerous. Boeken was drawn to the product at a young age, the Marlboro brand, with misleading advertising. He was kept smoking with misleading statements and falsehoods about smoking, disease, and addiction, the believability of which was enhanced by addiction; and Boeken's addiction was ensured when Marlboro's nicotine delivery was increased.

Boeken became financially vulnerable when he became unable to work after 1999. In the several years prior to 1999, his income had exceeded $200,000 per year.

Philip Morris contends that its fraud cannot be deemed reprehensible, because the health risks of smoking were public knowledge for decades; because the State of California protected cigarette companies from liability for the ten-year period of former Civil Code section 1714.45; and because its tortious conduct was

"remote," as shown by the trial court's instruction to the jury limiting liability for Philip Morris's fraudulent concealment to conduct that occurred prior to 1969.[22]

The health risks of smoking may have been public knowledge for decades, but given the evidence of the false controversy created by Philip Morris, the adulterations added to the cigarettes, and the fact that Boeken failed to understand and appreciate the risks of smoking, this argument fails.

Dr. Benowitz testified that most people who smoke ten or more cigarettes a day are addicted, and highly addicted smokers are those who smoke one pack or more of cigarettes per day. Boeken was smoking two packs a day by the time he was 14. Once addicted, smokers are particularly susceptible to misrepresentations and misleading statements such as those that comprised Philip Morris's campaign of doubt. He explained that non-suicidal, rational people use denial and rationalization to continue doing what is obviously or apparently harming them. Addiction interferes with the individual smoker's perception of the risk he is taking, and he will seize upon the evidence that appears to minimize the risk. Given a choice of conflicting opinions, an addict will choose the opinion that would support continued use. The evidence establishes that Philip Morris understood this weakness at least by 1959, used it to deceive, and kept its research on addiction secret.

In addition to fraud, the evidence establishes that Philip Morris acted with a conscious disregard of consumer health and safety in the manufacture and marketing of a dangerous product, and intentionally took advantage of the consumer expectation that "light" cigarettes were safer.

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[22] We do not reach Philip Morris's contention that the trial court was correct in limiting liability for fraudulent concealment to pre-1969 acts of concealment, since no issue has been raised by either party that would require us to do so.

Philip Morris knew that there was no reason to believe Marlboro Lights or Ultralights were any safer than its Reds.[23] Compensation has been described in scientific literature for 40 years, and Philip Morris's own research found no reduction in tar delivery for Marlboro Lights over regular cigarettes, but Philip Morris has only just recently initiated a study of human smokers to measure how much tar they actually take in. Although Philip Morris's laboratories were "state of the art," its studies of biological activity, using actual cigarettes that it markets, did not begin until 1999 or 2000.

Further demonstrating a conscious disregard for consumer safety, Philip Morris was *still* marketing "light" cigarettes at the time of trial, knowing that they may increase the risk of more serious cancers. And Philip Morris was still adding urea to Marlboro tobacco, causing more nicotine to be delivered more quickly to the smoker, as well as flavorings to create bronchodilators to open up the lungs.

Dr. Farone testified that while he was employed by Philip Morris, he was made aware by Philip Morris's own internal documents that low-tar cigarettes were not lower in tar delivery, and were not any safer than regular cigarettes. Philip Morris knew that smokers sucked light cigarettes harder and took longer puffs. Nevertheless, Philip Morris did no testing of the relative carcinogenicity of regular and light cigarettes.

The Marlboro Lights or Ultralights smoked by Boeken resulted in adenocarcinoma of the lung, which spread to his brain and spine. Since 1959, it has been known that smoking is the cause in more than 90 percent of the cases of

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[23] It is not clear from the record whether Marlboro "Golds" and Marlboro "Lights" are two separate pack styles, or whether the parties simply used the terms interchangeably. There was testimony stating that Marlboro "Golds" are "light" or "low-tar" cigarettes.

this aggressive form of lung cancer. But the only biological testing of carcinogenicity conducted by Philip Morris was done in a secret lab out of the country, where a less carcinogenic Marlboro cigarette was developed in 1979, using reconstituted tobacco. It was never marketed, and senior Philip Morris's scientist, Dr. Osdene, received all reports from the secret lab at his home and destroyed them after reading them.

At the time of trial, about 16 million people in the United States smoked Marlboros. Most of these smokers believed that low-tar cigarettes were less hazardous. Indeed, Marlboro Golds outsell the Reds. There has, however, been an increase in lung adenocarcinoma, a more aggressive and fast-spreading cancer, and it is accepted among experts that the rise is attributable to low-tar cigarettes. Nevertheless, Philip Morris continued to market so-called light Marlboros.

We cannot agree with Philip Morris's suggestion that the ten-year immunity provided by section 1714.45 makes its conduct less reprehensible. Philip Morris adds urea to make Marlboros more addictive, and flavorings to make it easier for the smoke to reach the lungs. Section 1714.45, as we have discussed, provided immunity only for unadulterated tobacco products. (See *Naegele*, *supra*, 28 Cal.4th at pp. 864-865; *Myers*, *supra*, 28 Cal.4th at p. 837.)

Philip Morris contends that harm to others cannot be considered in a punitive damage analysis. In *State Farm*, the Supreme Court held that due process prohibits the imposition of punitive damages for unrelated unlawful acts committed outside of the State's jurisdiction, or acts that were lawful in the jurisdiction where they occurred. (*State Farm*, *supra*, 538 U.S. at pp. 422-423.) The Court explained: "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the

merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." (*Id*. at p. 423.)

Similar out-of-state conduct may be relevant, however, to the issue of reprehensibility, when it demonstrates the deliberateness and culpability of the acts committed in the State where they are tortious, so long as the conduct has a "nexus to the specific harm suffered by the plaintiff." (*State Farm*, *supra*, 538 U.S. at p. 422.)

Philip Morris contends that its conduct in other states consisted solely of lawfully selling cigarettes, and that it was not shown to be similar to that which injured Boeken, because there was no evidence that it caused any injury to *specific* persons in other states.

We find nothing in *State Farm* that requires proof of injury to specific persons other than the plaintiff, wherever they reside, when the conduct in question is identical; and we find that a sufficient nexus has been shown here with Philip Morris's conduct in the other states. The very conduct that injured Boeken, directed to all smokers in the United States, repeated over many years with knowledge of the risk to human life and health, is probative of intentional deceit; and the national marketing of a defective product, knowing that consumers expected it to be less hazardous, is probative of a willful and conscious disregard of the danger to human life. (See *State Farm*, *supra*, 538 U.S. at pp. 423-424.)

Having concluded there is sufficient evidence supporting all five reprehensibility factors, a substantial punitive damage award was justified. We turn to *BMW*'s remaining guideposts to determine independently whether the amount of punitive damages awarded was so excessive as to violate due process. (See *BMW, supra*, 517 U.S. at pp. 568, 574-575.)

The second and third *BMW* guideposts advise us to review "the disparity between the actual or potential harm suffered by the plaintiff and the punitive

damages award," and "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm*, *supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)[24]

Prior to its decision in *State Farm*, the United States Supreme Court held that a punitive damage award four times the compensatory damages and 200 times the out-of-pocket expenses to be, under the facts of that case, "close to the line." (*Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 23.) In *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, the Court held that a ratio of 10 times the potential harm to plaintiffs "was not so 'grossly excessive' as to violate due process," although it was 526 times greater than the actual damages awarded by the jury. (*TXO Production Corp. v. Alliance Resources Corp., supra*, 509 U.S. at p. 444; see also, *BMW*, *supra*, 517 U.S. at p. 582.) Here, the trial court's reduced award amounted to a ratio of approximately 18:1, punitive to compensatory damages.

In *State Farm*, the Supreme Court again refused, as it had in the past, "to impose a bright-line ratio which a punitive damages award cannot exceed"; and the Court observed that it had "'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award' [citation]." (*State Farm*, *supra*, 538 U.S. at pp. 424-425, quoting *BMW*, *supra*, 517 U.S. at p. 582.)

The Court went on, however, to *suggest* appropriate ratios, stating: "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*,

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[24] The second criteria, being tied directly to the compensatory damages suffered by the plaintiff in the particular action, factors into the equation the Supreme Court's caveat that punishment for injury or harm to others not be included within the award.

in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. [Citation.] We cited that 4-to-1 ratio again in *Gore*. [Citation.] The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. [Citation.] While these ratios are not binding, they are instructive." (*State Farm, supra*, 538 U.S. at p. 425, citing *BMW*, *supra*, 517 U.S. at p. 581, and *Pacific Mutual Life Insurance Co. v. Haslip*, *supra*, 499 U.S. at pp. 23-24.)

Relying upon the Supreme Court's suggestion that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," (*State Farm*, *supra*, 538 U.S. at p. 425; see *BMW*, *supra*, 517 U.S. at p. 582), Philip Morris contends that the compensatory award of $5,539,127 was so substantial as to justify only a 1:1 ratio.

Philip Morris also relies upon the Supreme Court's warning that compensatory damages for emotional distress already contain a punitive element, which should not be duplicated in the punitive award. (*State Farm*, *supra*, 538 U.S. at p. 426.) Since Boeken's economist put his economic loss at more than $2 million, Philip Morris suggests that the remaining $3 million was compensation for emotional distress, also calling for a smaller ratio.

The Court's holding in *State Farm* was expressly based upon the fact that, *in that case*, "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." (*State Farm*, *supra*, 538 U.S. at p. 426.) And as the Supreme Court cautioned "[t]he precise award . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Id*. at p. 425.)

Certainly, some of Boeken's noneconomic damages may have been intended to compensate him for his emotional distress, since he did suffer "excruciating psychological pain," particularly while waiting to know whether the cancer had spread to his lymph nodes. But the verdict did not specify how much, if any, of the noneconomic damages were meant to compensate Boeken for his emotional distress. And Philip Morris ignores the overwhelming evidence of *physical* harm that was not present in *State Farm*.

The physical harm to Boeken caused by Philip Morris's fraud and defective product consisted of a 40-year addiction to cigarettes, chronic bronchitis, and a particularly aggressive and fast-spreading form of lung cancer that causes death in virtually 100 percent of cases where the cancer spreads to lymph nodes. Boeken's cancer spread not only from his lung to his lymph nodes, but also to his brain and spine, making death a certainty. His chemotherapy and radiation therapy may have prolonged his life, but did not prevent death from the cancer caused by his smoking addition.

Before discovering that the cancer had spread to his lymph nodes, Boeken underwent extremely painful surgery to remove the upper part of his right lung, and to insert seven drains through extremely painful incisions. Radiation and chemotherapy resulted in neuropathy, jumpy muscles, numbness in his feet and hands, painful muscle cramps, sometimes lasting an entire day, a burning sensation in his feet, imbalance, hallucinations, insomnia, wasting, constant nausea, vomiting, the loss of his sense of taste and smell, and aching bones in his knees and hips, like being "hit . . . with a hammer." He suffered from an "explosive itch," his arms felt like "the muscle [was] being stripped from the bone," and he suffered fungal growth in his esophagus that made it difficult to swallow.

In light of this evidence of physical injury, we cannot agree that the award was unusually large or that it must have consisted mostly of damages for emotional

distress. Thus, under the circumstances of *this* case, we cannot find that the compensatory award included a substantial punitive component requiring ratio of 1:1. (See *State Farm*, *supra*, 538 U.S. at p. 426.) This is particularly so in light of the potential harm in this case -- death.

With regard to "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" (*State Farm*, *supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575), we note that the California Legislature has declared that "keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the *highest priorities* in disease prevention for the State of California." (Health & Saf. Code, §§ 118950, subd. (a)(11), 104350, subd. (a)(9), italics added.)[25]

California imposes civil fines for "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) A $2,500 civil penalty may be assessed for each violation. (Bus. & Prof. Code, § 17206, subd. (a).) Boeken smoked two and one-half packs of Marlboros per day for 43 years, approximately 40,000 packs, as a result of Philip Morris's fraud. If the sale of each pack were considered a violation, Philip Morris's fine might equal the $100 million in reduced punitive damages awarded by the trial court in this case.

We recognize that the record contains no evidence of typical fines for unlawful or unfair business practices, but our discussion illustrates the propriety of a large multiplier within constitutional limits. In *State Farm*, the Supreme Court noted its reference in *BMW* to "a long legislative history, dating back over 700

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[25] To this end, California imposes civil penalties on persons who furnish cigarettes to minors. (Bus. & Prof. Code, § 22958.) It is also a crime, and carries a possible fine of $1,000 per cigarette after the third offense. (Pen. Code, § 308, subd. (a).)

years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." (*State Farm*, *supra*, 538 U.S. at p. 425; citing *BMW, supra*, 517 U.S. at p. 581, and fn. 33.) Recognizing that history and applying *State Farm*'s principles, one California court applied a ratio of nearly 4:1, which was, in its opinion, the outer constitutional limit for an *unexceptional* fraud case that caused only economic damages that were "neither exceptionally high nor low," and in which the fraudulent conduct was "neither exceptionally extreme nor trivial." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co*. (2003) 109 Cal.App.4th 1020, 1057.)

This case, by contrast, was exceptional, involving 40 years of fraud and the *continuing* marketing, with a conscious disregard of the danger to human life, of a product more dangerous than consumers expect. Further, although the compensatory damages were high, they were not exceptionally high, considering Boeken's former income and the pain he suffered. We conclude, therefore, that an appropriate ratio in this case may exceed 4:1.

In a recent product liability case involving a defective automobile occurring in a single model year, a California court applied a 5:1 ratio after an analysis of *State Farm*'s requirements, choosing a multiplier greater than 4:1 due to the defendant's reckless disregard of consumers' safety and lives. (*Romo v. Ford Motor Co., supra*, 113 Cal.App.4th at pp. 755, 763.) The case involved a roll-over of a 1978 Ford Bronco resulting in the death of three occupants and personal injury to three other occupants. The Court of Appeal concluded that evidence of the reprehensibility of Ford's conduct was substantial: "As stated in our original opinion, not only did Ford 'willfully and consciously ignore[] the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons' [citation], it also ignored its own internal safety standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength

of the roof before placing it in production. [Citation.]" (*Romo v. Ford Motor Co. supra*, 113 Cal.App.4th at p. 755.) Under that analysis, and the facts presented here, 40 years of fraud and Philip Morris's *continuing* conscious disregard for the safety and lives of consumers of its "low-tar" Marlboros justify an even greater multiplier.

We must now determine whether the circumstances of this case set the stage for one of the "few awards exceeding a single-digit ratio between punitive and compensatory damages [that] will satisfy due process" and therefore justify the 18:1 ratio of the reduced award. (*State Farm*, *supra*, 538 U.S. at p. 425.)

The United States Supreme Court has recognized, and reaffirmed in *State Farm*, that states have "'legitimate interests in punishing unlawful conduct and deterring its repetition,'" and that punitive damages may be properly imposed to further those interests. (*State Farm*, *supra*, 538 U.S. at p. 416, quoting *BMW*, *supra*, 517 U.S. at p. 568.)

Punitive damages are permitted by statute in California. (See Civ. Code, § 3294, subd. (a).) One of this state's principal purposes in permitting punitive damages is the deterrence of "'objectionable corporate policies'" when "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.]" (*Grimshaw v. Ford Motor Co*. (1981) 119 Cal.App.3d 757, 810 (*Grimshaw*); see *Egan v. Mutual of Omaha Ins. Co*. (1979) 24 Cal.3d 809, 820.)

"*Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles*." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 810, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has "exhibited a conscious and callous disregard of public safety in order to maximize corporate profits," and has

endangered the lives of thousands. (*Id*. at p. 819.) The California Supreme Court has repeatedly pointed out that "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective. [Citations.]" (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]" (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.) "An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. [Citation.]" (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 820.)[26]

The United States Supreme Court has not stated that wealth cannot be considered in determining punitive damages. Rather, it explained: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant

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[26] The most common measure of wealth for purposes of assessing punitive damages is net worth. (See *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515.) Prior to *State Farm*, California courts routinely upheld punitive damage awards that amounted to a percentage of the defendant's net worth, from .05 percent in *Grimshaw*, *supra*, 119 Cal.App.3d at page 820, to 5 percent in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166, and not exceeding 10 percent. (See *Storage Services v. Oosterbaan*, *supra*, 214 Cal.App.3d at p. 515.) An award must not be disproportionate to the defendant's ability to pay, even if it is justified by the reprehensibility of the wrong and bears a reasonable relation to the harm it inflicted. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 111.)

who acts within its jurisdiction. [Citation.]" (*State Farm*, *supra*, 538 U.S. at p. 422.) But the wealth of a defendant may not otherwise justify a constitutionally excessive award. (*State Farm*, *supra*, 538 U.S. at p. 427.)

Nor has the Supreme Court rejected its earlier approbation of considering "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." (*Pacific Mutual Life Insurance Co. v. Haslip*, *supra*, 499 U.S. at p. 22.) And it reaffirmed in *State Farm* that since "'repeated misconduct is more reprehensible than an individual instance of malfeasance,'" "'a recidivist may be punished more severely than a first offender,'" so long as "the conduct in question replicates the prior transgressions." (*State Farm*, *supra*, 538 U.S. at p. 423, quoting *BMW*, *supra*, 517 U.S. at p. 577.) Thus, profit may increase the degree of reprehensibility, with the similar result of justifying a greater punitive damage award. (See *State Farm*, *supra*, 538 U.S. at pp. 422-424, 426-427.)

We conclude that, as we interpret *State Farm*, wealth and profits may serve to increase a punitive damage award, but only to the extent that they were derived from the wrongful conduct that harmed the plaintiff or similar continuing conduct toward others, including such conduct in another state, so long as it is wrongful in the other state, thus demonstrating recidivist conduct and greater reprehensibility. (See *State Farm*, *supra*, 538 U.S. at pp. 422-424, 426-427.)

Here, there was evidence that, based upon its share of the domestic market, the net worth of Philip Morris USA at the time of trial was $75 billion, and that its cigarette profits were $14.7 million per day. Those figures, however, were based upon nationwide sales of all its cigarette brands, including lawful sales not procured by fraud, and including regular, as well as "light" cigarettes. We find no

evidence in the record of Philip Morris's profits with regard to Marlboros during the time of its fraud, or its profits with regard to Marlboro Golds, Lights, or Ultralights, or of the contribution of those profits to its present wealth. Thus, we perceive the evidence of wealth and profits insufficient to justify an increase in punitive damages above a single digit ratio.

We are satisfied that the reprehensible conduct established by the evidence, repeated over four decades, and resulting in the death of Boeken, justifies the highest single digit ratio that will satisfy due process while furthering California's policy of punishment and deterrence. (See *State Farm*, *supra*, 538 U.S. at p. 418; *BMW, supra*, 517 U.S. at pp. 574-575.)

Philip Morris contends that since other California juries have returned verdicts including substantial punitive damages for the same conduct, there is less need to further the state's interest in deterrence by imposing a higher multiplier. We agree that punitive damages previously imposed for the same conduct in another case, as well as possible future awards, are relevant in determining the amount of punitive damages required to sufficiently punish and deter. (*Stevens v. Owens-Corning Fiberglas Corp*. (1996) 49 Cal.App.4th 1645, 1661.)

In support of this point, however, Philip Morris refers to the judgments in two cases that are not final. One has been reversed by the court of appeal, and in the other, review has been dismissed and the Remittitur has not yet been filed.[27] Further, in its one-paragraph argument on this point, Philip Morris makes no attempt to show that the facts justifying the punitive damage award were the same

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[27] See e.g., *Whiteley v. Philip Morris, Inc*. (2004) 117 Cal.App.4th 635, modified and rehearing denied April 29, 2004; *Henley v. Philip Morris, Inc*., No. S123023, review dismissed September 15, 2004, formerly published at 114 Cal.App.4th 1429; see now, 9 Cal.Rptr.3d 29.

in both cases. *Potential* future awards in cases not shown to have identical issues are given little weight. (*Stevens v. Owens-Corning Fiberglas Corp*., *supra*, 49 Cal.App.4th at p. 1661.)

Philip Morris contends that the state's interest in deterring future wrongs is satisfied by the 1998 Master Settlement Agreement (MSA) between Philip Morris and other tobacco companies and the states, including California.[28] Philip Morris contends that the MSA requires it to pay $20.5 billion to the State of California over a number of years, beginning in 2000 and ending in 2025, and that such sum is designed to deter Philip Morris from engaging in the same conduct upon which the punitive damage award is based in this case.

In particular, Philip Morris points out, the MSA prohibits youth targeting, bans virtually all outdoor and transit advertising, prohibits any agreement to limit or suppress research on the health effects of smoking, and requires the dissolution of the Tobacco Institute and the Council for Tobacco Research.

The purpose of the lawsuits underlying the MSA was to recover the states' costs of providing health care to persons with smoking-related illnesses. (*A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc*. (2001 3d Cir.) 263 F.3d 239, 241.) The billions of dollars to be paid over the years by the signatory tobacco companies are intended to pay such claims, and to fund measures aimed at reducing underage smoking. (Health & Saf. Code, §§ 104555-104557; see *PTI, Inc. v. Philip Morris Inc*. (C.D.Cal 2000) 100 F.Supp.2d 1179, 1185.)

We note that Philip Morris has referred to no evidence in the record or judicially noticed to support its claim that its share of the payments under the MSA will amount to $20.5 billion in the period ending 2025. For proof of this assertion,

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[28] See the MSA online at http://caag.state.ca.us/tobacco/pdf/1msa.pdf.

Philip Morris refers only to argument in its memorandum of points and authorities in support of its motion for new trial. This is not evidence. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.)

The MSA requires payments from all tobacco companies participating in the settlement, according to their relative market shares. "Market share" is defined by the MSA as a percentage of the total number of cigarettes sold in the 50 United States. "Relative market share" refers to a percentage of the total number of cigarettes shipped in or to the 50 United States. Since 1998, Philip Morris has sold fewer cigarettes, which may have reduced its market share. But since there is no evidence in the record of the number of cigarettes sold or shipped by Philip Morris and the other participating tobacco companies, we cannot determine its market share or relative market share, and Philip Morris's figure of $20.5 billion remains just argument.[29]

Philip Morris has not shown from the provisions of the MSA that its purpose is punitive, rather than compensatory, relying instead upon the comments of a Florida court to that effect. (See e.g., *Liggett Group Inc. v. Engle* (Fla.App. 3 Dist. 2003) 853 So.2d 434, 469, review granted.) Our review of the MSA reveals no provision prohibiting the participating tobacco companies from raising prices to pay the sums called for in the agreement. Since 1998, although Philip Morris has sold fewer cigarettes, it has increased its prices, with the result that revenues were up 47.99 percent in 2000. Thus, there may be no punitive or deterrent effect as a result of the payments required under the MSA, since Philip Morris may simply absorb the cost by raising prices without any competitive disadvantage, because the other participants are likely to do the same. (See *Grimshaw*, *supra*, 119

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[29] The MSA provides for calculation of shares by an independent auditor.

Cal.App.3d at p. 820; cf., *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 929, fn. 14.)

We agree, however, that the MSA does provide Philip Morris with an incentive not to misrepresent the health risks of its products, and not to target underage smokers with its misrepresentations, since it prohibits it from doing so. On the other hand, it does not punish Philip Morris for its harm to Boeken. It does not deter Philip Morris from adding flavorings and chemicals that make its product more addictive. It does nothing to deter Philip Morris from marketing defective "light" cigarettes, knowing that they are more dangerous than the ordinary consumer expects.

In light of our due process analysis under *State Farm*, we shall order a new trial on punitive damages, unless plaintiff agrees to a reduction of the judgment to reflect a punitive damage award of approximately nine times the compensatory award, the sum of $50 million. Since we have determined that the record does not support a greater award that would satisfy the requirements of due process under the United States Constitution, we need not reach Boeken's claim on cross-appeal that the original award of $3 billion is not excessive under California law. For the same reason, we need not reach Philip Morris's contention that it was the result of passion and prejudice.[30]

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[30] This includes Philip Morris's complaint that in closing argument, Boeken's counsel committed misconduct by engaging in name-calling and inflammatory analogies, resulting in a punitive award based upon emotion and prejudice. Any prejudice had already dissipated prior to judgment due to the trial court's $2.9 billion reduction in the award. In any event, since Philip Morris admits that it did not object to any but one of the remarks, and does not claim to have asked that the jury be admonished, it has forfeited any claim of misconduct. (See *Sabella v. Southern Pac. Co., supra*, 70 Cal.2d at p. 318.) And Boeken denies misconduct, pointing out that the remarks were made in relation to negative comments about Philip Morris by others, as described by Philip

DISPOSITION

The judgment is affirmed in all respects except the amount of punitive damages. The judgment is modified to reduce the punitive damage award to $50 million, provided Boeken files a timely consent to such reduction in accordance with rule 24(d), California Rules of Court. If no such consent is filed within the time allowed, the judgment is reversed with regard to the amount of punitive damages only, and remanded for a new trial solely upon that issue. Both sides are to bear their own costs.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

Morris's own witnesses. If the issue of punitive damages is retried, Philip Morris will have the opportunity to object and show otherwise.